S163681

S_____

IN THE
SUPREME COURT OF CALIFORNIA

COUNTY OF SANTA CLARA, et al.,

~~*Plaintiffs*~~*/Petitioner,*

vs.

THE SUPERIOR COURT OF SANTA CLARA COUNTY,

Respondent;

SUPREME COURT
FILED

MAY 19 2008

Frederick K. Ohlrich Clerk

Deputy

ATLANTIC RICHFIELD COMPANY, et al.,

~~*Defendants*~~*/Real Parties in Interest.*

After a Decision By the Court of Appeal
Sixth Appellate District
Case Number H031540

PETITION FOR REVIEW

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ISSUE PRESENTED

Does the government's retention of an attorney under a contingent fee agreement giving the attorney a substantial, personal financial stake in successful prosecution of a public nuisance action continue to be "antithetical to the standard of neutrality that an attorney representing the government must meet when prosecuting a public nuisance action," even if the agreement provides that the contingent fee attorney will be subject to control by a government staff attorney?[1]

Presiding Justice Bamattre-Manoukian urged this Court to review the issue because "the circumstances under which public entities may properly retain private counsel under contingency fee agreements to assist in litigation of public nuisance abatement actions *is of great public significance.*"[2] (Concurring Opinion, p. 15, emphasis added.)

BACKGROUND

Defendants (or their alleged predecessors) lawfully made and sold lead pigments many decades ago. Three governmental entity plaintiffs (Santa Clara, San Francisco, and Oakland) sued for, among other things, public nuisance in their alleged capacity as "representatives of the People of the State of California pursuant to

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[1] *People ex rel. Clancy v. Superior Court* (1985) 39 Cal.3d 740, 750.

[2] The Court of Appeal's opinion is attached as Exhibit A.

California Code of Civil Procedure section 731." (*See* Petitioners' Appendix of Exhibits (Petitioners' Appx.), p. 5 [Third Am. Compl., ¶ 2a].) Those plaintiffs alleged that the mere presence of lead-based paint on homes and other buildings in California constitutes a public nuisance. (*Id.* at p. 56 [¶ 168].)

After these public nuisance claims were dismissed by the trial court at the pleading stage, the Court of Appeal overturned the demurrer and remanded the action to the trial court. (*County of Santa Clara v. Atlantic Richfield Co.* (2006) 137 Cal.App.4th 292.) Following remand, plaintiffs requested -- and the trial court subsequently granted -- leave to file an amended complaint that eliminated all claims in this case except for the revived public nuisance claims seeking an injunction to abate the alleged nuisance. (Petitioners' Appx., p. 86.)

Ten cities and counties are now prosecuting this public nuisance action: (*i*) the City and County of San Francisco ("San Francisco"); and (*ii*) the Counties of Santa Clara, Solano, Alameda, Monterey, San Mateo, and Los Angeles, and the Cities of Oakland, San Diego, and Los Angeles (the "non-San Francisco Plaintiffs"). The public nuisance claims raise questions of public health policy, including whether existing government programs suffice or preclude the claims, who should be held responsible to prevent and abate lead paint hazards, and how a hazard should be defined and abated.

Three law firms represent San Francisco in this lawsuit: Motley Rice LLC, Thornton & Naumes, and Mary Alexander and Associates. These firms have been retained pursuant to a written agreement that makes payment of any fees and costs contingent on

plaintiffs' monetary recovery in the action. San Francisco pays no "out-of-pocket" litigation costs or attorneys' fees; all costs and fees are advanced by the outside counsel, referred to as the "Special Assistant City Attorneys." (Petitioners' Appx., p. 230.) The contingent fee is set at "17% of any recovery." (*Id.* at p. 232.) Under the agreement, the San Francisco City Attorney purports to "retain final authority over all aspects of the Litigation." (*Id.* at p. 230.)

The non-San Francisco Plaintiffs have retained Cotchett, Pitre & McCarthy as government counsel under similar contingent fee agreements providing for payment of up to 17% of any recovery. (*E.g.*, Petitioners' Appx., p. 437 [Santa Clara].) These agreements also contain "control" language similar to that contained in the San Francisco agreement. (*E.g.*, *id.* at p. 323 ["The County Counsel . . . retain final authority over all aspects of the Litigation"].)

On February 2, 2007, one month after plaintiffs had informed the trial court of their decision to eliminate all claims in this case except for the recently remanded public nuisance claims, defendants filed a motion to bar payment to government-retained lawyers on a contingent fee basis. (Petitioners' Appx., p. 114.) Defendants based their motion on the rule stated by this Court in *People ex rel. Clancy v. Superior Court* (1985) 39 Cal.3d 740 (*Clancy*). Defendants did not seek to prevent plaintiffs from retaining counsel on a basis other than a contingency fee, but rather argued that *Clancy* precluded the government plaintiffs from hiring lawyers on a contingent fee basis in this public nuisance suit.

The trial court granted that motion, ruling that plaintiffs are precluded under the holding of *Clancy* in this public nuisance action

"from retaining outside counsel under any agreement in which the payment of fees and costs is contingent on the outcome of the litigation . . . ." (Petitioners' Appx., p. 795 [Order, p. 4:21-23].) Following the trial court's ruling, plaintiffs successfully sought a writ of mandate to compel the trial court to vacate its order.

The Court of Appeal began its analysis with *Clancy*. The Court recognized that, in *Clancy*, this Court held that public nuisance actions "fall within the class of civil cases in which the government's representative must be absolutely neutral" and that contingent fee agreements violate that neutrality requirement. (Opinion, pp. 7-8.)

However, the Court of Appeal determined that this holding from *Clancy* did not apply to this case, believing that the fee agreement at issue in *Clancy*, unlike the agreements here, included no provision "that the public entities' in-house counsel 'retain final authority over all aspects of the Litigation.'" (Opinion, pp. 8-9.) The Court of Appeal concluded that the principles articulated in *Clancy* are inapplicable "where private counsel are merely *assisting* government attorneys in the litigation of a public nuisance abatement action and are explicitly serving in a *subordinate* role, in which private counsel *lack any decision-making authority or control* . . . ." (*Id.* at p. 11, emphasis in original.)

In such circumstances, the Court of Appeal concluded that, despite their position as attorneys of record, "private counsel are <u>not *themselves* acting 'in the name of the government'</u> and have <u>no role in the 'balancing of interests' that triggers the absolute neutrality requirement</u>." (Opinion, pp. 11- 12, emphasis [underlining] added.)

WHY REVIEW SHOULD BE GRANTED

An attorney representing the government on behalf of the People in a public enforcement action is subject to duties critically different from those of an attorney representing a private party. For the attorney representing the government, "[i]n all his activities, his duties are conditioned by the fact that he 'is the representative not of any [*sic*] ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all . . . .'" (*People v. Superior Court (Greer)* (1977) 19 Cal.3d 255, 266 [quoting *Berger v. United States* (1935) 295 U.S. 78, 88].)

In the landmark *Clancy* opinion, this Court considered the application of this neutrality principle in the context of attorneys hired in public nuisance actions under contingent fee agreements. The Court emphasized the profound societal importance of the issue. The level of neutrality required of an attorney for the government in such an enforcement proceeding "is essential to the proper function of the judicial process as a whole. Our system relies for its validity on the confidence of society; without a belief by the people that the system is just and impartial, the concept of the rule of law cannot survive." (*Clancy*, *supra*, 39 Cal.3d at p. 746.)

This Court recognized that the ability to neutrally and objectively weigh the public's often conflicting interests regarding whether, as well as how, to proceed with litigation is lost when an attorney has a substantial personal stake in attaining a particular outcome: "When a government attorney has a personal interest in the litigation, the neutrality so essential to the system is violated. For this

reason prosecutors and other government attorneys can be disqualified for having an interest in the case extraneous to their official function." (*Clancy*, *supra*, 39 Cal.3d at p. 746.) This Court concluded that a contingent fee arrangement "is antithetical to the standard of neutrality that an attorney representing the government must meet when prosecuting a public nuisance abatement action." (*Id.* at p. 750.)

This case thus presents the question of whether the violation of the neutrality principle by an attorney with a direct, personal, substantial pecuniary interest in the outcome of a public enforcement action is washed clean so long as another attorney promises to exercise oversight to control the litigation.

While the Court of Appeal acknowledged *Clancy*'s neutrality rule, it held that contingent fee counsel could represent governments in public nuisance litigation if the counsel "lack[ed] any control over the litigation" and were controlled by other counsel not compensated on a contingent fee basis. (Opinion, p. 12.) In the Court of Appeal's view, *Clancy* does not bar contingent fee incentives for government counsel in public nuisance actions, but allows them so long as the attorney with the incentive had no "control" over the litigation.

As Presiding Justice Bamattre-Manoukian urged, an issue of this magnitude, with its impact on fundamental principles of due process and ethics, should be reviewed by this Court. (Concurring Opinion, p. 15.) Moreover, review of this issue cannot wait for decision after judgment. When the government grants its attorneys a profit stake in a particular outcome of an enforcement proceeding, the due process and ethical problems begin immediately and run throughout the litigation. The parties are entitled to impartial

adjudication "in the first instance," before litigation proceeds with such counsel. (*Ward v. Village of Monroeville* (1972) 409 U.S. 57, 62.) California courts and litigants are entitled to clear and definitive guidance on an issue of such importance to the judicial process.

LEGAL ARGUMENT

A. Before The Court of Appeal Decision, There Was No "Control" Exception To The Rule Articulated In *Clancy*

This Court in *Clancy* articulated a categorical rule prohibiting contingent fee agreements for government counsel in public nuisance cases. The Court began by acknowledging the long-standing due process and ethical principles that prohibit the government from vesting judicial or prosecutorial functions in individuals with a personal financial interest in the outcome of an enforcement action. (*Clancy*, *supra*, 39 Cal.3d at p. 747 [citing, *e.g.*, *Tumey v. Ohio* (1927) 273 U.S. 510, and *Village of Monroeville*, *supra*, 409 U.S. 57].)[3] With respect to the need for prosecutors to remain impartial, this Court reiterated its prior holding that a government prosecutor "'is the representative not of any [*sic*] ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling

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[3] In *Tumey v. Ohio*, *supra*, 273 U.S. 510, the United States Supreme Court emphasized the uncompromising nature of the neutrality principle where a "direct, personal, substantial pecuniary interest" is involved.

> Every procedure which would offer *a possible temptation* to the average man as a judge to forget the burden of proof required to convict the defendant, or which *might lead him not to hold the balance nice, clear, and true between the state and the accused* denies the latter due process of law.

(273 U.S. at pp. 523, 532, emphasis added.)

as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.'" (*Id.* at p. 746 [quoting *People v. Superior Court (Greer)*, *supra*, 19 Cal.3d at p. 266 (quoting *Berger*, *supra*, 295 U.S. at p. 88)].)

This Court reasoned that the requirement of prosecutorial neutrality extends to attorneys litigating claims brought by the government on behalf of the People to abate a public nuisance. In such cases, the government is pursuing a distinctly sovereign interest. Echoing *Tumey*'s admonition that government officers must be free of temptation, this Court concluded that any arrangement in which the attorney has a personal financial interest in the outcome violates that impartiality:

> [T]he abatement of a public nuisance involves a balancing of interests. On the one hand is the interest of the people in ridding their city of an obnoxious or dangerous condition; on the other hand is the interest of the landowner in using his property as he wishes . . . . Thus, as with an eminent domain action, the abatement of a public nuisance involves a delicate weighing of values. *Any financial arrangement that would tempt the government attorney to tip the scale cannot be tolerated.*

(*Clancy*, *supra*, 39 Cal.3d at p. 749, emphasis added.)

This Court concluded that the law prohibits any contingent fee arrangement in a public nuisance action as "antithetical to the standard of neutrality that an attorney representing the government must meet when prosecuting a public nuisance abatement action." (*Clancy*, *supra*, 39 Cal.3d at p. 750.)

B. The Court Of Appeal Decision Unsettles The Law By Creating A Wholly Unsupportable Exception To The *Clancy* Neutrality Requirement

The *Clancy* decision provided for a simple rule for government entities and their lawyers to follow, consistent with the principle that, "with regard to the ethical boundaries of an attorney's conduct, a bright line test is essential. As a practical matter, an attorney must be able to determine beforehand whether particular conduct is permissible." (*Snider v. Superior Court* (2003) 113 Cal.App.4th 1187, 1197.) The Court of Appeal here, however, found that, in some circumstances the government *can* hire private attorneys to prosecute public claims on a contingent fee basis, giving the prosecuting attorneys a profit stake in the outcome. To reach this conclusion, the Court devised a "control" exception to the neutrality requirement of the *Clancy* decision. (Opinion, pp. 10-12.)

According to the Court of Appeal, "outside" attorneys representing the government in a public nuisance action can have a profit stake in the outcome of the enforcement proceeding if they "lack any control over the litigation." (Opinion, p. 12.) Remarkably, the Court of Appeal concluded that, where the government professes to control the litigation, contingent fee counsel for the government are "merely assisting" and "are not *themselves* acting 'in the name of the government' and have no role in the 'balancing of interests' that

triggers the absolute neutrality requirement." (*Id.* at pp. 11-12, emphasis in original.) This holding creates an exception that would swallow the *Clancy* rule and, simply, would allow governments to hire counsel on contingent fee to litigate public nuisance claims.

The due process, ethical, and policy principles that preclude an attorney representing the government from having a profit stake in the outcome of an enforcement proceeding are fatally compromised by the fiction that the contingent fee attorney is not actually representing the government or playing any role in guiding the litigation if "supervised" by an in-house government attorney. To preserve the integrity of and public confidence in the prosecution of public actions, *every* attorney representing the government in such actions must meet the required neutrality standard. As this Court put it, "[t]he responsibility *follows the job*: if [the attorney] is performing tasks on behalf of and in the name of the government to which greater standards of neutrality apply, he must adhere to those standards." (*Clancy*, *supra*, 39 Cal.3d at p. 747, emphasis added.)

Indeed, if the rule were otherwise, local governments could employ a single "controlling" counsel and then hire all other counsel (including assistant district attorneys in criminal cases) on a contingent fee basis to pursue all enforcement actions. Such an exception would unravel decades of due process law.

The trial court summarized the fundamental principle at issue in this case in words that the Court of Appeal never confronted in its opinion:

> You [outside counsel] are not just a mouth piece [or] a potted plant. You are a lawyer.

> You can do the work of a lawyer. The work of a lawyer is to gather and present the evidence and make effective arguments to try to obtain a favorable outcome for his or her client. You're in no different position assisting, if you will, as you've described it County Counsel than you would be if County Counsel weren't there.

(Petitioners' Appendix, p. 814:6-14.)

1. *The Contingent Fee Arrangements Here And In* Clancy *Are Indistinguishable And Do Not Support The Exception Created Below*

The Court of Appeal's conclusion that the *Clancy* decision allows for a "control" exception rests in part on a mistaken assumption about the terms of the contingent fee arrangement in *Clancy*. The Court of Appeal wrote that in *Clancy*, "James Clancy was serving as Corona's *sole* representative in its public nuisance abatement action and had *complete control* over the litigation." (Opinion, p. 11, emphasis in original.) The Court of Appeal thus reasoned that -- despite the clear language to the contrary -- this Court left open the possibility that if the outside counsel for the government is not granted "complete control" over the litigation, a contingent fee arrangement could be permissible.

As described above, nothing in the *Clancy* opinion supports such a conclusion; and the agreement in *Clancy* directly contradicts it. As demonstrated in the motion for judicial notice that accompanies this petition, Mr. Clancy was hired under an agreement that contained "control" language substantively identical to the language in the

agreements with the contingent fee counsel in this case, and he was subject to the same level of "control" by the government that the Court of Appeal incorrectly relied on as a distinguishing fact here.

In this case, the agreements between the government and their outside counsel provide that the government and their City Attorneys or District Attorneys "retain final authority over all aspects of the Litigation." (Opinion, p. 9.) The retainer contract in *Clancy* similarly stated:

> C. Control of Litigation
>
> ATTORNEY agrees that each and every case, suit or proceeding in which he undertakes to assist the City Attorney of CITY, as aforesaid, *shall be and remain under and subject to the control and direction of said City Attorney or the City Council of CITY at all stages*, and that he shall at all times keep said City Attorney informed of all matters pertaining thereto . . . .

(Motion for Judicial Notice (RJN), Exh. A at p. 14 [Agreement for Legal Services, p. 3], emphasis added; also attached hereto as Exh. B.) As Mr. Clancy himself described it, "[u]nder the above written terms of the City's contract, the control and direction of the case is in the hands of the City Attorney, not Attorney Clancy." (RJN, Exh. C at p. 22 [Petition for Rehearing, p. 14], emphasis in original; *see also* RJN, Exhs. B and D [initial opinion in Clancy and Order Denying Rehearing, but modifying opinion].)

Despite the government's stated control over Mr. Clancy, this

Court held that the contingent fee arrangement between the City and Mr. Clancy was improper. (*Clancy*, *supra*, 39 Cal.3d at p. 750.) Defendants alerted the Court of Appeal to its misunderstanding of the nature of the contingent fee agreement at issue in *Clancy* in a request for rehearing that cited the specific language of the *Clancy* contingent fee agreement. The Court of Appeal declined to reconsider the issue.

2. Clancy *Contains No Language Supporting The Exception Created Below*

In creating the "control" exception, the Court of Appeal also concluded that this Court's reference in *Clancy* to *Sedelbauer v. State* (Ind.Ct.App. 1983) 455 N.E.2d 1159, "suggests" that such an exception was contemplated by this Court. (Opinion, p. 14.) Again, the record before this Court in *Clancy*, coupled with the Court's treatment of *Sedelbauer*, demonstrates that no exception was "suggested."

In *Clancy*, the Court noted that Mr. Clancy "relie[d] on an Indiana authority, [*Sedelbauer*]," in his briefing. (*Clancy*, *supra*, 39 Cal.3d at p. 749 n.3.) Mr. Clancy had cited to *Sedelbauer* for a very narrow purpose, however. Defendants in *Clancy* had argued that Mr. Clancy, in addition to holding an improper financial stake in the outcome of the litigation, held "an obvious personal interest by virtue of his being an attorney for a Phoenix, Arizona organization that opposes adult material . . . ." (RJN, Exh. E at p. 29 [Petition for Hearing, p. 7].) In response to the argument that such a "personal interest . . . would be grounds for disqualification" (*ibid.*), Mr. Clancy submitted a supplemental brief in which he cited and quoted *Sedelbauer*, without further argument. (RJN, Exh. F at p. 38

[Additional Authorities, p. 2].)

In *Sedelbauer*, a defendant convicted of distributing obscene material challenged the conviction, in part, on the ground that it was improper for a private attorney from an anti-obscenity group to have any role in the prosecution. (*Sedelbauer*, *supra*, 455 N.E.2d at p. 1164.) The case did not involve a contingent fee arrangement. The court held that Indiana law did not prohibit a private attorney with such a background from assisting a public prosecutor, although Indiana law apparently would have precluded him from acting as the only attorney on the case. (*Ibid.*) *Sedelbauer* thus merely confirms the fact that the government can hire -- under the proper circumstances -- outside counsel to assist in criminal actions.

As this Court noted, Mr. Clancy's citation to *Sedelbauer* did not help him. *Sedelbauer* neither justified permitting Mr. Clancy to proceed as the named representative of the "People" in the caption of the case (in violation of Code of Civil Procedure section 731), nor permitted him to be paid on a contingent fee basis (in violation of due process and ethical principles). "In that case [*Sedelbauer*] . . . the court approved the assistance of a private attorney only because he appeared 'not in place of the State's duly authorized counsel.'" (*Clancy*, *supra*, 39 Cal.3d at p. 749 n.3 [quoting *Sedelbauer*, *supra*, 455 N.E.2d at p. 1164].)

Whether *Sedelbauer* supported Mr. Clancy's position that he should not be disqualified on the basis of his alleged personal biases was, and is, irrelevant to the contingent fee issue. *Sedelbauer* did not save Mr. Clancy from disqualification for his financial stake in the outcome of the litigation or from being removed as the named party.

One paragraph after the reference to *Sedelbauer*, this Court issued its holding that contingent fee arrangements in public nuisance actions are "antithetical to the standard of neutrality that an attorney representing the government must meet when prosecuting a public nuisance abatement action." (*Clancy*, *supra*, 39 Cal.3d at p. 750.)

Any doubt on this subject is completely erased by this Court's final discussion of the correct parties to a government public nuisance action. *Clancy*'s final footnote states that, although the "point may seem technical," the issue regarding the proper plaintiff "could become crucial if a city council and its city attorney differed as to whether a nuisance action should be brought." (*Clancy*, *supra*, 39 Cal.3d at p. 750 n.5.) This Court then ordered that on remand the caption of the case needed to be changed such that it "be brought in the name of Dallas Holmes, the Corona City Attorney" -- *i.e.*, not *People ex rel. Clancy*. (*Ibid.*)

If a "control" exception to the bar on contingent fee agreements had been intended, this Court would have permitted Mr. Clancy to continue under his contingent fee arrangement subject to the control of Mr. Holmes or others. Instead, this Court *precluded* Mr. Clancy from representing the government under his contingent fee agreement, adding that the government "may hire Clancy" back on a non-contingent fee basis. (*Clancy*, *supra*, 39 Cal.3d at p. 750 n.5.)[4]

[4] To reach its contrary result, the Court of Appeal referred to two additional cases: *City and County of San Francisco v. Philip Morris, Inc.*, (N.D.Cal. 1997) 957 F.Supp. 1130, and *Philip Morris, Inc. v. Glendening* (Md. 1998) 709 A.2d 1230. However, neither actually supports the court's conclusion, although they demonstrate the need for this Court to review the issue. Both *City and County of San Francisco* and *Glendening* merely stand for the proposition that, when a public entity asserts a proprietary claim of the type that also could

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3. *The Court Of Appeal's Exception Is Unworkable And Threatens The Judicial Process*

The "control" exception articulated by the Court of Appeal would be impossible for a court to monitor or to enforce. Whether the government has adequately "controlled" outside counsel so as to cleanse a public nuisance action of outside counsel's financial self-interest would be difficult, if not impossible, to determine, particularly in light of attorney-client privilege issues. Moreover, even if it were theoretically possible, such a determination would require constant judicial supervision of the public and private attorneys' respective roles in the litigation to ensure that the government was not ceding any substantive decisions to outside counsel.

The United States Supreme Court has described the impossibility of attempting to review or monitor any inherent conflict of interest found to permeate a government prosecution:

> Appointment of an interested prosecutor is also an error whose effects are pervasive. Such an appointment calls into question, and therefore requires scrutiny of, the conduct of an entire prosecution, rather than simply a discrete prosecutorial decision [such as would be reviewed in a "harmless-error"

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be asserted by a private plaintiff, it may retain counsel in the same way as could a private plaintiff. To the extent these two cases include language implying that the contingent fee agreements also are acceptable because the governmental entities indicated they would retain some degree of control over the activities of private counsel, such language is contrary to the holding and principles of *Clancy*.

> analysis]. Determining the effect of this appointment thus would be extremely difficult. A prosecution contains a myriad of occasions for the exercise of discretion, each of which goes to *shape* the record in a case, but few of which are *part* of the record.

(*Young v. United States ex rel. Vuitton* (1987) 481 U.S. 787, 812-13 (plurality), emphasis in original.)[5]

These issues already have been highlighted in this case. When defendants requested information from plaintiffs regarding their purported "control" over the private counsel, plaintiffs refused to produce any information, claiming such information is privileged. (*See* Petitioners' Appx., pp. 384-85 [Lawless Decl., Exh. K at pp. 1-2 (meet-and-confer letter from plaintiff stating that any "correspondence that does not directly relate to the Engagement and Contingency Fee Agreement is categorically exempt from discovery pursuant to the attorney client privilege and the attorney work product doctrine")].)

Instead, plaintiffs submitted numerous self-serving declarations purporting to describe the relationship between plaintiffs and their counsel and vouching for the control that the government maintains over its private contingent fee counsel. Such unverifiable assertions, if allowed to suffice, will enable the government, with the stroke of a pen, to circumvent the rule in *Clancy*, and will permit private attorneys

[5] The Court of Appeal's opinion provides no guidance on the standard for determining "control."

to influence the direction of public enforcement actions for the benefit of their financial interest in the outcome.

Moreover, these declarations are contradicted by plaintiffs' own statements about why they need outside counsel. On the one hand, plaintiffs claim that, notwithstanding their own substantial legal staffs, they require outside counsel with "massive resources and specialized expertise" in public nuisance cases. (Petition for Writ of Mandate, p. 22.) On the other, they assert that, notwithstanding their lack of time and expertise, they "retain absolute control over all aspects of the litigation . . . ." (*Id.* at p. 30.) The former statement suggests that the latter is untrue. If the rule of *Clancy* is to be modified to permit a "control" exception, trial courts will have to engage in fact-finding about whether "control" exists in particular cases. Such fact-finding, if it is to be more than an empty ceremony, cannot be limited to self-serving declarations such as those in the present record. It must include discovery and cross-examination to permit adversarial testing of those declarations.

Even *attempting* to implement the "control" exception thus will undermine public confidence in the neutrality of the government's prosecution of public nuisance and other similar enforcement actions. Members of the public have great interest in knowing that their lawyers are acting with objectivity in balancing competing public interests, and should not have to wonder whether private attorneys are being held to that standard.

C. This Due Process And Ethical Issue Must Be Addressed Now

As the government entities have stated, they have retained the outside counsel in this case expressly because of outside counsel's "massive resources and *specialized expertise*" in public nuisance cases. (Petition for Writ of Mandate, p. 22, emphasis added.) The outside counsel in this litigation have been the driving force behind this type of litigation across the country; they created and marketed it. These attorneys have been retained to advance their ideas and to provide their advice, guidance, and strategic ability. It is beyond dispute that they have done so -- and will continue to do so -- throughout the course of this litigation. (*See also Clancy*, *supra*, 39 Cal.3d at p. 749 n.4 [an attorney's "discretionary functions are not confined to the period before the filing" of the action].)

This issue cannot be "fixed" later in the case. Indeed, the issue in *Clancy* arose and was resolved during the early stages of the case -- at the same time discovery was proceeding and the parties were disputing a subpoena *duces tecum*. (*See Clancy*, *supra*, 39 Cal.3d at p. 744.)

The United States Supreme Court recognizes this same need to resolve such issues at the time they arise. In *Village of Monroeville, supra*, 409 U.S. 57, the Court held unconstitutional an Ohio statute authorizing mayors to sit as judges in ordinance violation cases where the fines from the violations would go to the municipality's coffers controlled by the mayor. The Court noted that the due process violation needed to be resolved prior to any appeal that might later "correct" the problem. In such circumstances, an appeal as a

> "procedural safeguard" does not guarantee a fair trial in the mayor's court; there is nothing to suggest that the incentive to convict would be diminished by the possibility of reversal on appeal. Nor, in any event, may the State's trial court procedure be deemed constitutionally acceptable simply because the State eventually offers a defendant an impartial adjudication. Petitioner is entitled to a neutral and detached judge *in the first instance*.

(409 U.S. at pp. 61-62, emphasis added; *see also Clements v. Airport Auth.* (9th Cir. 1995) 69 F.3d 321, 333 ["an adjudication that is tainted by bias can not be constitutionally redeemed by review in an unbiased tribunal"] [citing *Village of Monroeville*].)

This issue should be reviewed now.

CONCLUSION

This Court should grant review to clarify that California law, based upon long-settled due process and ethical principles, precludes an attorney representing the government in a public nuisance action from being compensated on a contingent fee basis.

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CERTIFICATION OF WORD COUNT

Pursuant to California Rule of Court, Rule 8.504(d)(1), the attached petition, excluding tables and attachments, consists of 5,073 words as counted by the Microsoft Word word-processing program used to generate this petition. The brief was typed using Times New Roman proportionally spaced font in 14-point typeface.

Dated: May 19, 2008

Sean Morris

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

COUNTY OF SANTA CLARA et al., Petitioners, v. THE SUPERIOR COURT OF SANTA CLARA COUNTY, Respondent; ATLANTIC RICHFIELD COMPANY et al., Real Parties in Interest.	H031540 (Santa Clara County Super. Ct. No. CV788657)

A group of public entities are prosecuting a representative public nuisance action against a group of companies that manufactured lead paint. This action seeks abatement as the sole remedy, and it has not yet proceeded to trial. The companies filed a motion seeking to bar the public entities from compensating their private counsel by means of contingent fees. The superior court, relying on *People ex rel. Clancy v. Superior Court* (1985) 39 Cal.3d 740 (*Clancy*), issued an order barring the public entities from compensating their private counsel by means of any contingent fee agreement. The public entities seek writ relief from the superior court's order. They assert that *Clancy* does not bar *all* contingent fee agreements in public nuisance abatement actions, and that *their* contingent fee agreements are valid. We conclude that *Clancy* does not bar the

public entities' contingent fee agreements with their private counsel, and we issue a writ of mandate directing the superior court to vacate its order and issue a new order denying the companies' motion.

I. Background

The public entities' action against the companies originally included causes of action for fraud, strict liability, negligence, unfair business practices, and public nuisance.[1] (*County of Santa Clara v. Atlantic Richfield Co.* (2006) 137 Cal.App.4th 292, 300 (*Santa Clara I*).) In March 2006, this court reversed the superior court's judgment of dismissal and ordered the superior court to reinstate the representative public nuisance cause of action and the negligence, strict liability, and fraud causes of action. (*Santa Clara I*, at p. 333.) In January 2007, the public entities filed a motion seeking leave to file a proposed fourth amended complaint that alleged a single representative public nuisance cause of action and sought only abatement. Throughout this litigation, the public entities have been represented by both their in-house counsel and private counsel.

In February 2007, the companies filed a "motion to bar payment of contingent fees to private attorneys." They asserted that "the government cannot retain a private attorney on a contingent fee basis to litigate a public nuisance claim." The companies sought "an order that precludes plaintiffs from retaining outside counsel under any agreement in which payment of fees and costs is contingent on the outcome of the litigation."

The companies attached to their motion a number of fee agreements between the public entities and their private counsel, and the public entities filed opposition to which

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[1] The petitioners in this case are Santa Clara County (Santa Clara), San Mateo County (San Mateo), Monterey County (Monterey), Solano County (Solano), Los Angeles County (LA County), Alameda County (Alameda), City and County of San Francisco (San Francisco), City of Oakland (Oakland), City of Los Angeles (LA City), and City of San Diego (San Diego).

they attached their fee agreements and declarations from their in-house and private counsel. The fee agreements and declarations disclose that the public entities and private counsel agreed that, other than $150,000 that would be forwarded by Santa Clara toward costs, private counsel would pay all further costs and would not receive any fees unless the action was successful. If the action succeeded, private counsel could seek a court award of costs and would be entitled to recover any unrecompensed costs from the "recovery" and a fee of 17% of the "net recovery."

The fee agreements provide different definitions of "recovery." Some of the agreements define "recovery" as "moneys other than civil penalties," while others define "recovery" as the "amount recovered, by way of judgment, settlement, or other resolution." Some of the agreements include "both monetary and non-monetary" in their definitions of "recovery." The San Diego agreement defines "net recovery" as "the payment of money, stock, and/or in the value of the abatement remedy after the deduction of the costs paid or to be paid." The Santa Clara fee agreement provides that, "[i]n the event that the Litigation is resolved by settlement under terms involving the provision of goods, services or any other 'in-kind' payment, the Santa Clara County Counsel agrees to seek, as part of any such settlement, a mutually agreeable monetary settlement of attorneys' fees and expenses."

In April 2007, the superior court heard both the companies' motion "to bar payment" and the public entities' motion for leave to file the fourth amended complaint. The court granted the public entities' motion for leave to file the fourth amended complaint and ordered that the pleading be filed within 30 days.

Although there were some preliminary issues about the "ripe[ness]" of the companies' motion, the superior court resolved the motion on its merits.[2] The court

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[2] At the hearing, the superior court noted that it was "somewhat puzzled as to what a contingent fee would be based upon if you're not permitted to [re]cover damages . . . ." The court noted that attorney's fees were not available in this type of

rejected the public entities' claim that *Clancy* was distinguishable. The court concluded that, under *Clancy*, "outside counsel must be precluded from operating under a contingent fee agreement, regardless of the government attorneys' and outside attorneys' well-meaning intentions to have all decisions in this litigation made by the government attorneys." The court granted the companies' motion and "preclud[ed] Plaintiffs from retaining outside counsel under any agreement in which the payment of fees and costs is contingent on the outcome of the litigation . . . ." The court allowed the public entities "30 days to file with the court new fee agreements" or "declarations detailing the fee arrangements with outside counsel."

The public entities sought a writ of mandate in this court, and the superior court stayed the matter pending resolution of this writ proceeding. This court issued an order to show cause on the writ petition, the companies filed a return, and the public entities filed a reply.[3]

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public nuisance abatement action. "The fact that . . . you may not recover damages for a public nuisance that may be abated seems to me would eliminate the — the necessity of having the value — of having a contingent fee agreement with counsel . . . ."

The public entities asserted that the motion was not "ripe" because it could not be predicted what type of remedy or fees would be available. Private counsel for the public entities asserted that "[i]f there is no recovery in this case from any monetary funds, the people who are going to suffer here are the folks who are assisting county counsel. We believe at this time since we have not had the benefit of analyzing what the remedies are going to be for this type of abatement we can't forecast that." "The risk truly is on private counsel. We may never see a nickel from the case."

The attorney for the companies admitted that, "[o]n the question of non ripeness," he was "confused about the common fund issue and where a contingency might come from." "Now if the plaintiffs ultimately figure out a way to have a pot of money against which a seventeen percent contingency could apply," the contingency fee would be a "vast[]" amount of money.

[3] Numerous amicus curiae briefs have also been filed in this proceeding.

II. Discussion

The public entities claim that the superior court erred in categorically precluding contingent fee agreements. They maintain that *Clancy* does not categorically bar the retention of private counsel to represent a public entity in a public nuisance abatement action under a contingent fee agreement. The public entities contend that their engagement of private counsel under contingent fee agreements in this action falls outside the scope of *Clancy*'s holding.

A. Propriety of Writ Review

In this case, the companies, for whatever reason, did not style their motion as a motion to *disqualify* the public entities' private counsel.[4] While an order *disqualifying* counsel is an *appealable* order (*Chronometrics, Inc. v. Sysgen, Inc.* (1980) 110 Cal.App.3d 597, 599, fn.1), the order issued by the superior court granting the companies' motion was not appealable because it did not explicitly disqualify the public entities' private counsel. Instead, it precluded the public entities from employing their private counsel *under any contingent fee arrangements*.

"It would be naive not to recognize that the motion to disqualify opposing counsel is frequently a tactical device to delay litigation." (*Comden v. Superior Court* (1978) 20 Cal.3d 906, 915.) In this case, the companies' motion threatened not only to deprive the public entities of their choice of counsel but also to preclude them from pursuing any appellate remedies. Writ review of this order is appropriate because appellate review is unavailable, and any error in the order would result in unjustifiably depriving the public entities of their right to counsel of choice.

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[4] The attorney for the companies asserted at the hearing on the motion that the companies "do not ask for disqualification" but only that "the paying of contingency fees be barred."

B. *Clancy*

We begin with *Clancy*, since *Clancy* was the basis for the superior court's ruling. In *Clancy*, the City of Corona (Corona) had hired James Clancy, a private attorney, to bring nuisance abatement actions against businesses selling obscene publications in violation of a city ordinance. (*Clancy*, *supra*, 39 Cal.3d at p. 743.) The employment contract between Corona and Clancy, who was an independent contractor rather than an employee, provided that Clancy was to be paid $60 per hour for his work in bringing public nuisance actions, but he would be paid only $30 per hour for his work in any public nuisance action in which Corona did not prevail or in which Corona prevailed but did not recover its attorney's fees. (*Clancy*, at pp. 745, 747.)

Clancy, acting as a "special" City Attorney, filed a public nuisance complaint against a bookstore and its operator seeking abatement, a declaratory judgment and an injunction. (*Clancy*, *supra*, 39 Cal.3d at p. 744.) The bookstore operator unsuccessfully sought to disqualify Clancy as attorney for Corona. (*Ibid.*) The bookstore operator then sought writ relief, contending that it was "improper for an attorney representing the government to have a financial stake in the outcome of an action to abate a public nuisance" and asserting that "a government attorney prosecuting such actions must be neutral, as must an attorney prosecuting a criminal case." (*Clancy*, at p. 745.)

The California Supreme Court recognized that "there is a class of civil actions that demands the representative of the government to be absolutely neutral. This requirement precludes the use in such cases of a contingent fee arrangement." (*Clancy*, *supra*, 39 Cal.3d at p. 748.) "[A] lawyer cannot escape the heightened ethical requirements of one who performs governmental functions merely by declaring he is not a public official. The responsibility follows the job: if Clancy is performing tasks on behalf of and in the name of the government to which greater standards of neutrality apply, he must adhere to those standards." (*Clancy*, at p. 747.)

The first question was whether a public nuisance abatement action fell within the class of civil cases in which the government's representative must be absolutely neutral. The court noted that ordinary civil cases brought by the government do not fall within this class of cases, and therefore contingent fee arrangements in ordinary civil cases are permitted.[5] (*Clancy*, *supra*, 39 Cal.3d at p. 748.) However, public nuisance abatement actions differ from ordinary civil actions brought by the government. "[T]he abatement of a public nuisance involves a balancing of interests. On the one hand is the interest of the people in ridding their city of an obnoxious or dangerous condition; on the other hand is the interest of the landowner in using his property as he wishes. And when an establishment such as an adult bookstore is the subject of the abatement action, something more is added to the balance: not only does the landowner have a First Amendment interest in selling protected material, but the public has a First Amendment interest in having such material available for purchase. Thus, as with an eminent domain action [to which the absolute neutrality requirement applies], the abatement of a public nuisance involves a delicate weighing of values. Any financial arrangement that would tempt the government attorney to tip the scale cannot be tolerated." (*Clancy*, at p. 749.) Since public nuisance abatement actions generally involve "a delicate weighing of values" and "balancing of interests," such actions fall within the class of civil cases in which the government's representative must be absolutely neutral.

The next question was whether the need for the government's representative in a public nuisance abatement action to be absolutely neutral precluded Clancy from prosecuting Corona's public nuisance abatement action against the bookstore operator under the contingent fee arrangement. The court concluded that this contingent fee

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[5] "Nothing we say herein should be construed as preventing the government, under appropriate circumstances, from engaging private counsel. Certainly there are cases in which a government may hire an attorney on a contingent fee to try a[n ordinary] civil case." (*Clancy*, *supra*, 39 Cal.3d at p. 748.)

arrangement precluded Clancy from being absolutely neutral. "Clancy has an interest in the result of the case: his hourly rate will double if the City is successful in the litigation. Obviously this arrangement gives him an interest extraneous to his official function in the actions he prosecutes on behalf of the City." (*Clancy*, *supra*, 39 Cal.3d at pp. 747-748.) "[W]e hold that the contingent fee arrangement between the City and Clancy is antithetical to the standard of neutrality that an attorney representing the government must meet when prosecuting a public nuisance abatement action. In the interests of justice, therefore, we must order Clancy disqualified from representing the City in the pending abatement action." (*Clancy*, at p. 750.) The court expressly noted that Corona was not precluded from rehiring Clancy to represent it on other terms. (*Clancy*, at p. 750, fn. 5.)

C. Application of *Clancy*

As in *Clancy*, the public entities in this case have engaged the services of private counsel pursuant to contingent fee agreements under which private counsel will participate in representing the interests of the public entities in a public nuisance abatement action. The public entities argue that *Clancy*'s absolute neutrality requirement does not apply here because private counsel have *not* been engaged as the *sole* representatives of the public entities, as James Clancy was in *Clancy*, but only to *assist* the government attorneys who are prosecuting this action on behalf of the public entities. Unlike James Clancy, private counsel do not have decision-making authority and the power to control the litigation, both of which have been retained by the public entities' in-house counsel. The public entities claim that the limited and subordinate role of private counsel does not justify applying the absolute neutrality requirement to them.

It is undisputed that private counsel have been engaged to play a limited, subordinate role in this litigation. All of the public entities are represented by in-house counsel in addition to their private counsel. The fee agreements between five of the

public entities and their private counsel explicitly provide that the public entities' in-house counsel "retain final authority over all aspects of the Litigation."[6] Their private counsel submitted declarations confirming that the public entities' in-house counsel retain "complete control" of the litigation.[7] The two remaining fee agreements, those of Oakland and Solano, purport to grant private counsel "absolute discretion in the decision of who to sue and who not to sue, if anyone, and what theories to plead and what evidence to present." However, Oakland has disclaimed this fee agreement and asserts that it has retained "complete control" of this litigation and is revising its fee agreement to so reflect.[8] Solano's private counsel asserts that Solano's in-house counsel has "maintained and continue[s] to maintain complete control over all aspects of the litigation" and "all decision making authority and responsibility." The record before us

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[6] Four of the public entities submitted declarations to the effect that they had "retained and continue[d] to retain complete control of the litigation," were "actively involved in and direct[ed] all decisions related to the litigation," and have "direct oversight over the work of outside counsel." San Francisco declared that "[t]he San Francisco City Attorney's Office has in fact retained control over all significant decisions" in this case.

[7] Private counsel Cotchett, Pitre & McCarthy (Cotchett) submitted a declaration in which it stated that it had been retained by Santa Clara, Solano, Alameda, Oakland, Monterey, San Mateo, and San Diego. Cotchett asserted that the public entities' in-house counsel "have maintained and continue to maintain complete control over all aspects of the litigation" and "all decision making authority and responsibility." Private counsel Thornton & Naumes, private counsel Motley, Rice, and private counsel Mary E. Alexander submitted declarations asserting that they had been retained by San Francisco to assist in this litigation. They asserted that San Francisco's City Attorney "has retained complete control over this litigation" and has "exercised full decision-making authority and responsibility."

[8] Oakland submitted a declaration by a city attorney that: "Notwithstanding any documents suggesting the contrary, the Office of the City Attorney has retained complete control over the prosecution of the public nuisance cause of action in this case as it relates to the interests of the People of the City of Oakland." Oakland asserted that it was "in the process of revising" its fee agreement "so that it reflects the reality of the relationship" between Oakland and its private counsel.

does not contain any fee agreements between the remaining three public entity petitioners and any private counsel.[9]

The public entities have therefore established that their private counsel serve in a subordinate role in which private counsel merely assist in-house counsel and lack any authority to control the litigation. The only remaining question is whether the limited role of private counsel renders inapplicable *Clancy*'s absolute neutrality requirement. While *Clancy* contains language suggesting that it is establishing a broad rule banning contingent fee agreements with private counsel in public nuisance abatement actions, we are bound by only the *holding* in *Clancy*, not all of its language.

"We acknowledge, as we must, that we are bound to follow binding precedent of a higher court, and that the refusal to do so is in excess of our own jurisdiction. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455-456 [20 Cal.Rptr. 321, 369 P.2d 937].) However, we are not bound by dicta . . . . In every case, it is necessary to read the language of an opinion in the light of its facts and the issues raised, in order to

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[9] Seven separate fee agreements between the various public entity petitioners and their private counsel were before the superior court and are before us. These fee agreements are between private counsel and Santa Clara, Monterey, San Francisco, Solano, Oakland, Alameda, and San Diego.

No fee agreements are before us involving LA City, LA County or San Mateo. LA City submitted a declaration below stating that it has not yet joined the litigation and has not retained private counsel, although it anticipates joining the litigation and needing the services of private counsel.

San Mateo did not submit a fee agreement, but it submitted a declaration by its in-house counsel in which in-house counsel asserted that it "has retained and continues to retain complete control of the litigation and retains final authority over all aspects of the litigation." The declaration stated that a fee agreement was attached, but no such attachment appears in petitioners' appendix of exhibits. However, Cotchett's declaration confirmed that it had been retained by San Mateo and that San Mateo retained "complete control over all aspects of the litigation" and "all decision making authority and responsibility."

Nothing in the record before us indicates that LA County has retained private counsel to represent it in this litigation or contemplates doing so.

determine which statements of law were necessary to the decision, and therefore binding precedent, and which were general observations unnecessary to the decision. The latter are dicta, with no force as precedent." (*Fireman's Fund Ins. Co. v. Maryland Casualty Co.* (1998) 65 Cal.App.4th 1279, 1300-1301.)

"It is a foundational principle that: '"[T]he language of an opinion must be construed with reference to the facts presented by the case, and the positive authority of a decision is coextensive only with such facts."' [Citations.] 'A litigant cannot find shelter under a rule announced in a decision that is inapplicable to a different factual situation in his own case, nor may a decision of a court be rested on quotations from previous opinions that are not pertinent by reason of dissimilarity of facts in the cited cases and in those in the case under consideration.'" (*Harris v. Capital Growth Investors XIV* (1991) 52 Cal.3d 1142, 1157.)

The California Supreme Court's holding in *Clancy* must be construed with reference to the facts presented in *Clancy*, and the binding authority of *Clancy* is limited to the facts upon which the California Supreme Court rested its holding. James Clancy was serving as Corona's *sole* representative in its public nuisance abatement action and had *complete control* over the litigation. *Clancy*'s holding was based on the rationale that, where private counsel are "performing tasks on behalf of and in the name of the government" in a public nuisance abatement action in which there must be a "balancing of interests," private counsel must be absolutely neutral and cannot be compensated by a contingent fee arrangement, because private counsel's financial interest might "tip the scale" on which these interests are balanced. (*Clancy*, *supra*, 39 Cal.3d at pp. 747, 748, 749.)

In contrast, where private counsel are merely *assisting* government attorneys in the litigation of a public nuisance abatement action and are explicitly serving in a *subordinate* role, in which private counsel *lack any decision-making authority or control*, private counsel are not *themselves* acting "in the name of the government" and have no

role in the "balancing of interests" that triggers the absolute neutrality requirement. Private counsel serving in such a subordinate role do not supplant the public entities' in-house attorneys, who must be absolutely neutral, and are not in a position where their interest in maximizing their contingent fee can influence the balancing of interests or any of the other decisions that are made exclusively by the public entities' in-house attorneys. Because *Clancy*'s holding is limited to the facts that were before the California Supreme Court in *Clancy*, a private attorney serving as the sole representative of the government in a public nuisance abatement action and completely controlling the litigation, *Clancy* does not justify the superior court's order barring the public entities from compensating, by means of a contingent fee agreement, their private counsel, who are merely assisting in-house counsel and lack any control over the litigation.[10]

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[10] The concurring opinion posits that it is a "factual determination that must be made on a case-by-case basis" whether private counsel may assist in the representation of a public entity under a contingent fee agreement in a public nuisance case. This case is not an appropriate vehicle for us to opine on the precise nature of the decision that a superior court would be required to make in a case in which there were factual disputes regarding the nature of the fee agreement or the relationship between private counsel and a public entity.

The issue before us in this writ proceeding was presented to the superior court on undisputed facts and was resolved by the court as a pure question of law. Although it was undisputed that private counsel were engaged solely to assist in-house counsel in representing the public entities, with in-house counsel retaining complete control over the litigation, the superior court, relying solely on *Clancy*, ruled that contingent fee agreements between public entities and private counsel were categorically barred in public nuisance cases.

Because the superior court resolved the sole issue presented in this writ proceeding as a matter of law, and it is presented to us as a matter of law, this case does not present the issue that the concurring opinion purports to resolve. Whether, in a case in which there are disputed facts, a superior court primarily makes a factual determination or primarily exercises its discretion in deciding whether to permit private counsel to represent a public entity under a contingent fee agreement in a public nuisance action is a question not presented in this case. Resolution of that question must await a case in which it is presented and would necessarily require resolution of the appropriate standard of review for this court to exercise in such a case. As these issues are not before us here, we express no opinion on them.

D. Other Cases

Since *Clancy* does not support the superior court's order, we must consider whether any other authority does.

None of the other cases cited by the companies provides any support for the superior court's order. In *Tumey v. State of Ohio* (1927) 273 U.S. 510 (*Tumey*), Tumey was arrested for unlawful possession of alcohol and tried by the mayor of the village, who had the power to ascertain guilt and set the amount of the fine. The mayor would be paid $12 out of the fine if Tumey was convicted, but would receive no funds if Tumey was not convicted. (*Tumey*, at pp. 520, 523, 533.) The United States Supreme Court concluded that it was a violation of due process for the mayor to adjudge Tumey's culpability because the mayor had a pecuniary interest in the outcome. "That officers acting in a judicial or quasi judicial capacity are disqualified by their interest in the controversy to be decided is of course the general rule." (*Tumey*, at p. 521.) "[I]t certainly violates the Fourteenth Amendment and deprives a defendant in a criminal case of due process of law to subject his liberty or property to the judgment of a court, the judge of which has a direct, personal, substantial pecuniary interest in reaching a conclusion against him in his case." (*Tumey*, at p. 523.) "It is certainly not fair to each defendant brought before the mayor for the careful and judicial consideration of his guilt or innocence that the prospect of such a prospective loss by the mayor should weigh against his a[c]quittal." (*Tumey*, at p. 532.) Because *Tumey* was solely concerned with the financial interest of the *adjudicator*, it is not relevant to the financial interest of private counsel assisting in the *prosecution* of a proceeding. Private counsel here are not playing an adjudicative role in the proceedings.

Ward v. Village of Monroeville, Ohio (1972) 409 U.S. 57 (*Ward*), like *Tumey*, found a due process violation where a mayor served as the adjudicator. The only difference between *Ward* and *Tumey* was that the mayor in *Ward* did not *personally* benefit from conviction, but had an interest in conviction because the fines funded the

village's budget. In *Marshall v. Jerrico, Inc.* (1980) 446 U.S. 238 (*Marshall*), the United States Supreme Court concluded that "that the strict requirements of *Tumey* and *Ward* are not applicable to the determinations of the assistant regional administrator, whose functions resemble those of a prosecutor more closely than those of a judge." (*Marshall*, at p. 243.) Thus, the "strict requirements" of *Tumey* and *Ward* apply only to adjudicators, not to those who are functioning like prosecutors.

The public entities note that *Clancy* distinguished *Sedelbauer v. State* (1983) 455 N.E.2d 1159 (*Sedelbauer*). In a footnote responding to James Clancy's reliance on *Sedelbauer*, the California Supreme Court briefly noted that *Sedelbauer* "approved the assistance of a private attorney only because he appeared 'not in place of the State's duly authorized counsel.'" (*Clancy, supra*, 39 Cal.3d at p. 749, fn. 3.) In *Sedelbauer*, the Indiana appellate court found no error in the fact that a private attorney with a private interest in the suppression of pornography had served as cocounsel in a criminal obscenity prosecution and "appeared *with* a deputy prosecuting attorney, and not in place of the State's duly authorized counsel." (*Sedelbauer*, at p. 1164.) We agree with the public entities that *Clancy*'s treatment of *Sedelbauer* suggests that there is a critical distinction between a private attorney who *supplants* the public entity's "duly authorized counsel" and a private attorney who serves only in a *subordinate* role as "co-counsel" to the public entity's in-house counsel.

Two other cases relied on by the public entities also provide some support for their claim that absolute neutrality is not required of private counsel who are merely assisting in-house counsel and have no control over the litigation.

In *Philip Morris Inc. v. Glendening* (1998) 709 A.2d 1230 (*Glendening*), the State of Maryland entered into a contingent fee agreement with private counsel to pursue a tort action against tobacco companies. Private counsel would be paid only out of a "money judgment," and there was no indication that the action would include a public nuisance abatement cause of action. (*Glendening*, at pp. 1231-1233.) The tobacco companies

sought to invalidate the contingent fee agreement. The Maryland Court of Appeals distinguished *Clancy* in its ruling validating the agreement. "[N]o constitutional or criminal violations [are] directly implicated here, and, hence, there is no potential conflict of interest. Also, and more important, notably absent from *Clancy* is a legislative enactment authorizing the 'special employment' of outside counsel in 'extraordinary' cases. Equally important, is the absence of the oversight of an elected State official, who 'shall have the authority to control all aspects of [outside counsel's] handling of the litigation,' and whose 'authority shall be final, sole and unreviewable.' [Citation.] These, we believe, are significant material distinctions which permit a finding that the instant contingency fee contract is not violative of due process or public policy." (*Glendening*, at pp. 1242-1243.) Although *Glendening* was not a public nuisance abatement action, the fact that it distinguished *Clancy* in part on the ground that control would be exercised by the state rather than by private counsel supports our conclusion that absolute neutrality is not required of private counsel here.

In *City and County of San Francisco v. Philip Morris, Inc.* (N.D. Cal. 1997) 957 F.Supp. 1130 (*CCSF*), tobacco company defendants, relying on *Clancy*, sought to disqualify the private attorneys hired by the public entity plaintiffs to assist in the prosecution of a lawsuit. The lawsuit alleged a variety of causes of action, but it did not include any public nuisance abatement cause of action. (*CCSF*, at pp. 1134-1135.) The federal district court distinguished *Clancy* and refused to disqualify the private attorneys. (*CCSF*, at pp. 1135-1136.) "[The private attorneys are] acting here as co-counsel, with plaintiffs' respective government attorneys retaining full control over the course of the litigation. Because plaintiffs' public counsel are actually directing this litigation, the Court finds that the concerns expressed in *Clancy* regarding overzealousness on the part of private counsel have been adequately addressed . . . . [¶] The Court also finds that the civil tort nature of this action meaningfully distinguishes it from *Clancy*. This lawsuit, which is basically a fraud action, does not raise concerns analogous to those in the public

nuisance or eminent domain contexts discussed in *Clancy*. Plaintiffs' role in this suit is that of a tort victim, rather than a sovereign seeking to vindicate the rights of its residents or exercising governmental powers. [¶] Finally, the case as it stands now will not require the private attorneys to argue about the policy choices or value judgments suggested by defendants regarding the regulation of tobacco. Rather, plaintiffs' attorneys simply will be arguing, as they likely have in many other cases for private sector clients, that a tort has been committed against their clients." (*CCSF*, at p. 1135.)

While the litigation in *CCSF* was not a public nuisance abatement action, and the court distinguished *Clancy* on that ground, the court also distinguished *Clancy* on the ground that the private attorneys would not be controlling the litigation, which would be controlled by the public entities' in-house counsel. Thus, *CCSF* too provides some support for our conclusion that absolute neutrality is not required where private counsel serve in a subordinate role and lack any control over the litigation.

E. Conclusion

Clancy itself does not bar the public entities from engaging private counsel under a contingent fee arrangement to assist in this litigation, so long as the public entities' in-house counsel retain control over all decision-making. The record before us contains absolutely no evidence that private counsel have ever engaged in any conduct that invaded the sphere of control exercised by the public entities' in-house counsel.[11] No authority supports barring private counsel from assisting the public entities under a contingent fee arrangement in this litigation. Therefore, the superior court's order is unjustified, and we will direct the court to set it aside.

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[11] No doubt the companies will seek disqualification of the public entities' private attorneys if they acquire evidence that the private attorneys are improperly exercising control over this action.

III. Disposition

Let a writ of mandate issue commanding the superior court to set aside its order granting the companies' motion and to enter a new order denying the motion. The public entities shall recover their costs.

Mihara, J.

I CONCUR:

McAdams, J.

Santa Clara County, et al. v. Superior Court (Atlantic Richfield Company, et al.)
H031540

BAMATTRE-MANOUKIAN, J., CONCURRING

I concur in the result reached in the majority opinion that the California Supreme Court's decision in *People ex rel. Clancy v. Superior Court* (1985) 39 Cal.3d 740 (*Clancy*) does not bar the public entity plaintiffs in this case from retaining private counsel under their current contingency fee agreements to assist the government attorneys in the litigation of this public nuisance abatement action. I write separately to express my view that the determination of whether a contingency fee agreement between a public entity and private counsel is barred in a public nuisance abatement action is a factual determination that must be made on a case-by-case basis.

Our Supreme Court has instructed that prosecutorial neutrality is required in a public entity's prosecution of a public nuisance abatement action. (*Clancy*, *supra*, 39 Cal.3d at pp. 748-749.) To ensure that a contingency fee agreement is not "antithetical to the standard of neutrality that an attorney representing the government must meet when prosecuting a public nuisance abatement action" (*id.* at p. 750), I believe the court must review the factual circumstances of each case to determine whether, as a result of the contingency fee agreement, "the prosecutor's *discretionary decisionmaking* has been placed within the influence or control of an interested party" (*Hambarian v. Superior Court* (2002) 27 Cal.4th 826, 841 (*Hambarian*)) or is subject to "conflicting personal interests" (*People v. Superior Court* (*Greer*) (1977) 19 Cal.3d 255, 267).

As I will explain, my conclusion that a case-by-case factual determination is required derives from a careful review of the decision in *Clancy* and other decisions of the California Supreme Court, as well as decisions of the federal and state courts. I have also carefully considered the important public policy issues addressed in *Clancy* and in the helpful briefs of the parties and the amicus curiae.[1]

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[1] Amicus briefs were filed by the American Chemistry Council; the Association of California Water Agencies; the Chamber of Commerce of the United States and the

I also write separately to recognize the court's inherent power to review contingency fee agreements (*Roa v. Lodi Medical Group, Inc.* (1985) 37 Cal.3d 920, 933), which will allow the trial court to oversee the propriety of the contingency fee agreements in this case throughout the course of the litigation.

A. *The Clancy Decision*

The contingency fee agreement at issue in *Clancy* was between a private attorney, James Clancy, and the City of Corona (City). Included in Clancy's employment contract with the City was a fee agreement providing that "Clancy is to be paid $60 per hour, 'provided, however, that with respect to each and every suit undertaken by Attorney hereunder which results in a final judgment against City, said fee shall be reduced to $30.00 per hour . . . and provided further that said fee of $60.00 shall also be reduced to $30.00 per hour . . . in each and every suit undertaken by Attorney hereunder in which City is a successful party if and to the extent that the City does not recover its attorney's fees from the unsuccessful party or parties.' " (*Clancy, supra*, 39 Cal.3d at p. 745.)

After the City adopted a resolution declaring a business selling sexually explicit materials, known as the "Book Store," to be a public nuisance, Clancy, on behalf of the City as its " 'special attorney,' " filed a complaint against the Book Store and its owners for abatement of a public nuisance, declaratory judgment, and an injunction. (*Clancy, supra*, 39 Cal.3d at pp. 743-744.) City later amended its complaint to substitute " 'City Attorney of Corona' " as Clancy's title in the action. (*Id.* at p. 744.) The trial court denied the defendants' motion to disqualify Clancy as attorney for the City, and the defendants subsequently sought a writ of prohibition from the California Supreme Court

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American Tort Reform Association (joint brief); the Civil Justice Association of California; the California State Association of Counties and the League of California Cities (joint brief); and Public Justice, P.C., Healthy Children Organizing Project; and the Western Center for Law and Poverty (joint brief).

"to bar the People from proceeding with Clancy instead of the regular City Attorney of Corona as its representative . . . ." (*Ibid.*) The defendants contended that it was improper for Clancy to have a financial stake in the outcome because an attorney prosecuting a public nuisance action must be neutral.

To determine whether Clancy should be disqualified, the California Supreme Court evaluated "the propriety of a contingent fee agreement between a city government and a private attorney whom it hired to bring abatement actions under the city's nuisance ordinance." (*Clancy*, *supra*, 39 Cal.3d at p. 743.) The court began its evaluation by examining the requirement of neutrality for public prosecutors in criminal prosecutions and government attorneys in eminent domain actions. (*Clancy*, *supra*, 39 Cal.3d at pp. 748-749.) Regarding criminal prosecutions, the *Clancy* court noted that "[c]ontingent fee contracts for criminal prosecutors have been recognized to be unethical and potentially unconstitutional . . . ." (*Id.* at p. 748.) The court then determined that "[t]he justification for the prohibition against contingent fees in criminal actions extends to certain civil cases." (*Ibid.*) The "certain civil cases" included eminent domain actions, because the government attorney in an eminent domain action occupies " 'a position analogous to a public prosecutor' " and is therefore " ' "possessed . . . of important governmental powers that are pledged to the accomplishment of one objective only, that of impartial justice." [Citation.]' " (*Id.* at pp. 748-749.)

The requirement of a neutral prosecuting attorney also extended to public nuisance abatement actions, the *Clancy* court reasoned, because a public nuisance abatement action is similar to an eminent domain action. Both types of actions involve a balancing of the interests of the public and the landowner. (*Clancy*, *supra*, 39 Cal.3d at p. 749.) "Thus, as with an eminent domain action, the abatement of a public nuisance involves a delicate weighing of values. Any financial arrangement that would tempt the government attorney to tip the scale cannot be tolerated." (*Id.* at p. 749.)

Moreover, the *Clancy* court observed, "[p]ublic nuisance abatement actions share the public interest aspect of eminent domain and criminal cases, and often coincide with criminal prosecutions." (*Clancy*, *supra*, 39 Cal.3d at p. 749.) "A suit to abate a public nuisance can trigger a criminal prosecution of the owner of the property. This connection between the civil and criminal aspects of public nuisance law further supports the need for a neutral prosecuting attorney" (*Ibid.*, fn. omitted.)

Having determined that a neutral prosecuting attorney was required in a public nuisance abatement action, the *Clancy* court examined Clancy's contingency fee agreement to evaluate whether prosecutorial neutrality would be maintained in the City's public nuisance action against the Book Store. The court found that Clancy had "an interest in the result of the case: his hourly rate will double if the City is successful in the litigation. Obviously this arrangement gives him an interest extraneous to his official function in the actions he prosecutes on behalf of the City." (*Clancy*, *supra*, 39 Cal.3d at pp. 747-748.) Consequently, the court held that Clancy should be disqualified because his contingency fee agreement was "antithetical to the standard of neutrality that an attorney representing the government must meet when prosecuting a public nuisance abatement action." (*Id.* at p. 750.)

The *Clancy* court issued a writ of mandate that, among other things, directed the trial court to issue an order dismissing Clancy as the City's attorney in the pending public nuisance abatement action. (*Clancy*, *supra*, 39 Cal.3d at p. 750.) However, in a footnote the court stated that "on remand the action herein should be brought in the name of Dallas Holmes, the Corona City Attorney. The City may hire Clancy to represent Holmes." (*Id.* at p. 750, fn. 5.)

B. *The Test for Prosecutorial Neutrality*

As I have discussed, the *Clancy* court indicated, in holding that Clancy's contingency fee agreement with the City of Corona violated the standard for prosecutorial neutrality, that the standard of neutrality that applies to a government attorney in a public

nuisance abatement action is the same standard that applies to a public prosecutor in a criminal action. (*Clancy*, *supra*, 39 Cal.3d at pp. 748-749.) Therefore, for the purpose of evaluating the propriety of a contingency fee agreement in a public nuisance abatement action, decisions concerning the disqualification of a district attorney's office for a violation of the standard of neutrality are instructive.

The *Clancy* court's analysis relied in part on an earlier California Supreme Court decision, *Greer*, *supra*, 19 Cal.3d 255, for the proposition that a government attorney, like a public prosecutor, must be absolutely neutral. (*Clancy*, *supra*, 39 Cal.3d at pp. 746-747.) In *Greer*, the defendants sought the disqualification of the district attorney on the ground that a conflict of interest existed because the victim's mother was employed in the district attorney's office. (*Greer*, *supra*, 19 Cal.3d at p. 259.) Our Supreme Court affirmed the trial court's order disqualifying the district attorney because the prosecutor might have an "emotional stake" in the case that could "disturb his exercise of impartial judgment in pretrial and trial proceedings." (*Id.* at p. 270.)

The *Greer* court's analysis of the disqualification issue was based upon the defendant's fundamental due process right not to be deprived of liberty without a fair trial and the prosecutor's obligation "to respect this mandate." (*Greer*, *supra*, 19 Cal.3d at p. 266.) "The prosecutor is a public official vested with considerable discretionary power to decide what crimes are to be charged and how they are to be prosecuted. [Citations.] In all his [or her] activities, his [or her] duties are conditioned by the fact that he [or she] "is the representative not of any ordinary party to a controversy, but of a sovereignty whose obligation is to govern impartially . . . and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.' [Citations.]" (*Ibid.*; *People v. Fierro* (1991) 1 Cal.4th 173, 208.)

In *Greer*, our Supreme Court also recognized that the requirement of prosecutorial impartiality arose from the prosecutor's discretionary powers. "[I]t is precisely because the prosecutor enjoys such broad discretion that the public he [or she] serves and those he

[or she] accuses may justifiably demand that he [or she] perform his [or her] functions with the highest degree of integrity and impartiality, and with the appearance thereof." (*Greer*, *supra*, 19 Cal.3d at pp. 266-267.) Thus, "the advantage of public prosecution is lost if those exercising the discretionary duties of the district attorney are subject to conflicting personal interests which might tend to compromise their impartiality. In short, the prosecuting attorney ' "is the representative of the public in whom is lodged a discretion which is not to be controlled by the courts, or *by an interested individual* . . . . " ' [Citation.]" (*Id.* at p. 267.)

In *Hambarian*, *supra*, 27 Cal.4th 826, our Supreme Court also addressed the issue of prosecutorial neutrality. The court considered the merits of the defendant's motion to disqualify the district attorney's office on the ground that the district attorney had accepted the services of a forensic accountant who was compensated by the victim, the City of Orange. (*Id.* at p. 829.) Under Penal Code section 1424, a motion to disqualify a prosecutor on the ground of conflict of interest may not be granted unless "the evidence shows that a conflict of interest exists that would render it unlikely that the defendant would receive a fair trial." (Pen. Code, §1424, subd. (a)(1).) The court recognized, as it did in *Greer*, that a public prosecutor is required to "act in an impartial manner" because he or she has "broad discretion over the entire course of the criminal proceedings . . . ." (*Hambarian, supra,* 27 Cal.4th at pp. 839-840.) Accordingly, the *Hambarian* court determined that the proper test for a disqualifying conflict of interest under Penal Code section 1424 is whether "the prosecutor's *discretionary decisionmaking* has been placed within the influence or control of an interested party." (*Id.* at p. 841, fn. omitted.)

Our Supreme Court in *Hambarian* further instructed that a motion for disqualification of a district attorney's office should be reviewed on a case-by-case basis, because "no one factor will compel disqualification in all cases; 'the entire complex of facts' must be reviewed to determine 'whether the conflict makes fair and impartial treatment of the defendant unlikely.' [Citation.]" (*Hambarian*, *supra*, 27 Cal.4th at

p. 834; *People v. Eubanks* (1996) 14 Cal.4th 580, 599.) Therefore, because the evidence showed that the forensic consultant had no control over "critical prosecutorial decisions," the *Hambarian* court determined that the motion to disqualify the district attorney's office was properly denied. (*Id.* at pp. 839, 842.) Citing *Clancy*, the court explained that "recusal [of the district attorney] is not necessary to ensure [the defendant's] right to fair treatment during all portions of the criminal proceedings. [Citation.]" (*Hambarian, supra*, 27 Cal.4th at p. 840.)

Review of these California Supreme Court cases clarifies that a public prosecutor may be disqualified if a case-by-case review of the factual circumstances surrounding the claimed conflict of interest indicates that "the prosecutor's *discretionary decisionmaking* has been placed within the influence or control of an interested party" (*Hambarian, supra*, 27 Cal.4th at p. 841), or is subject to "conflicting personal interests" (*Greer, supra*, 39 Cal.3d at p. 267). Thus, the test for a disqualifying conflict of interest may be stated as follows: where the factual circumstances in a case indicate that the public prosecutor's discretionary decisionmaking is not likely to be impartial, the standard of neutrality has been violated and the prosecutor may be disqualified.

The test for a disqualifying conflict of interest established by the California Supreme Court in *Hambarian* and *Greer* is equally applicable in civil actions, because a government lawyer in a civil action occupies "a position analogous to a public prosecutor [and] is 'possessed . . . of important governmental powers that are pledged to the accomplishment of one objective only, that of impartial justice.' [Citation.]" (*City of Los Angeles v. Decker* (1977) 18 Cal.3d 860, 871.) Thus, " '[a] government lawyer in a civil action . . . has the responsibility to seek justice and to develop a full and fair record, and he [or she] should not use his [or her] position or the economic power of the government to harass parties or to bring about unjust settlements or results.' [Citation]." (*Ibid.*)

The California Supreme Court in *Clancy* applied the test for a disqualifying conflict of interest in a civil action when the court found that a contingency fee

agreement doubling the fees of a private attorney who succeeded in prosecuting a public nuisance abatement action created a conflict of interest, due to the private attorney's personal financial interest in the litigation. (*Clancy*, *supra*, 39 Cal.3d at pp. 749-750.) The private attorney was apparently able, under his contingency fee agreement, to exercise the discretionary decisionmaking authority of a government attorney in litigating the public nuisance action, with the sole exception that the city council would decide whether to bring an action under the public nuisance ordinance. (*Id.* at p. 749, fn. 4.) Therefore, the factual circumstances in *Clancy* demonstrated that as a result of the contingency fee agreement, the private attorney was not likely to be impartial in his discretionary decisionmaking. The *Clancy* court therefore determined that the contingency fee agreement in that case was "antithetical to the standard of neutrality that an attorney representing the government must meet when prosecuting a public nuisance abatement action." (*Id.* at p. 750.)

C. *Federal and State Court Decisions*

Federal and state courts have also grappled with the issue of the propriety of a contingency fee agreement between a public entity and private counsel. Several decisions support a general rule that a contingency fee agreement is permitted, even though private counsel retains a financial stake in the outcome, where the agreement provides that government attorneys will maintain control over the discretionary decisionmaking throughout the litigation.

In Ohio, the federal court recently considered the Sherwin-Williams Company's challenge to the contingency fee agreements between three Ohio cities and private counsel in lead paint litigation. (*Sherwin-Williams Co. v. City of Columbus* (S.D. Ohio, July 18, 2007, No. C2-06-829, 2007 U.S. Dist. Lexis 51945 (*Sherwin-Williams*).) The court's original ruling on Sherwin-Williams's motion for injunctive relief directed the cities to amend their contingency fee agreements because the court found that "the contingency fee agreements between private counsel and the three cities were

unconstitutional insofar as the agreements reposed an impermissible degree of public authority upon retained counsel, who have a financial incentive not necessarily consistent with the interests of the public body." (*Id.* at pp. *3-*4.)

In a subsequent ruling, the federal court in *Sherwin-Williams* approved the two contingency fee agreements that had been amended to expressly vest in the city attorney "control over the litigation and the sole authority to authorize any settlement of any claim or complaint." (*Sherwin-Williams*, *supra*, 2007 U.S. Dist. Lexis 51945, p. *6.) However, the court found that the third contingency fee agreement was not adequately amended because the agreement provided that neither private counsel nor the city could settle or dismiss the case without the consent of the other. (*Id.* at p. *10.) The court stated that it had made it "abundantly clear" in its previous ruling that a contingency fee agreement "between a municipality and private counsel in a public nuisance action which purports to vest in private counsel authority to prevent a settlement or dismissal of a suit is unconstitutional." (*Ibid.*)

In a public nuisance abatement action in California, the federal court considered the defendants' motion to disqualify private counsel on the ground that their contingency fee agreement violated the government attorney's duty of neutrality. (*City of Grass Valley v. Newmont Mining Corp.* (E.D. Cal., Nov. 20, 2007, No. 2:04-cv-00149-GEB-DAD, 2007 U.S. Dist. Lexis 89187.) Relying on *Clancy*, the defendants argued that a public entity could not hire private counsel on a contingency fee basis to litigate a public nuisance abatement action. The federal court rejected this argument and denied the disqualification motion, finding that defendants had not "countered Plaintiff's showing that the City Attorney for the City of Grass Valley is acting as co-counsel in this action and the City retains 'ultimate decision-making authority in the case.' [Citation.]" (*Grass v. Newmont Mining Corp.*, *supra*, U.S. Dist. Lexis 89187, p. *3.)

In tort litigation involving a state's claim against the tobacco industry for recovery of the health care costs of citizens with tobacco-related illnesses, the defendants also

relied on *Clancy* to challenge the legality of a contingency fee agreement between a public entity and its private counsel. In *Philip Morris Inc. v. Glendening* (1998) 349 Md. 660, 709 A.2d 1230 (*Glendening*), the Maryland Court of Appeals rejected the defendants' challenge to the contingency fee agreement between the Attorney General of Maryland and the private law firm that represented the State of Maryland in tort litigation against the tobacco industry. The contingency fee agreement expressly provided that the " 'Attorney General shall have the authority to control all aspects of [outside counsel's] handling of the litigation . . . [and] such authority shall be final, sole and unreviewable.' [Citation.]" (*Id.* at p. 663.)

After determining that state law authorized the Attorney General to enter into contingency fee agreements, the *Glendening* court addressed the defendants' claim that the contingency fee agreement violated due process and public policy under the principle, as illustrated in *Clancy*, that a public officer should not participate in a matter in which he or she has a personal or pecuniary interest. (*Glendening*, *supra*, 349 Md. at p. 684.) The Maryland court determined that *Clancy* was distinguishable because the case before it did not directly implicate any constitutional or criminal violations. "Equally important," the court also found, was the absence in *Clancy* "of the oversight of an elected State official, who 'shall have the authority to control all aspects of [outside counsel's] handling of the litigation,' and whose 'authority shall be final, sole and unreviewable." (*Id.* at p. 686.) The court therefore held that the Maryland Attorney General's oversight prevented outside counsel's financial interest in the outcome of the tobacco litigation from violating prosecutorial neutrality. (*Id.* at p. 688.)

The federal court similarly determined in *City and County of San Francisco v. Philip Morris, Inc.* (N.D. Cal. 1997) 957 F. Supp. 1130 (*Philip Morris*) that a contingency fee agreement between several public entities and the private law firm of Lieff, Cabraser, Heinmann & Bernstein in tobacco-related tort litigation was not barred under *Clancy*. The court stated, "While the contingent fee arrangement here clearly gives

Lieff, Cabraser a stake in the litigation, the Court finds that this case is sufficiently distinguishable from *Clancy* to allow for the government's retention of private counsel. First, as plaintiffs explain, Lieff, Cabraser is acting here as co-counsel, with plaintiffs' respective government attorneys retaining full control over the course of the litigation. Because plaintiffs' public counsel are actually directing this litigation, the Court finds that the concerns expressed in *Clancy* regarding overzealousness on the part of private counsel have been adequately addressed by the arrangement between Lieff, Cabraser and the plaintiffs." (*Id.* at p. 1135.) The court in *Philip Morris* also found that the case before it was a civil tort action, which further distinguished it from *Clancy*. (*Ibid.*)

Thus, these federal and state courts have ruled that the propriety of a contingency fee agreement between a public entity and private counsel must be evaluated on a case-by-case basis, by examining the terms of the agreement to determine whether prosecutorial neutrality has been preserved by the government attorneys retaining control over discretionary decisionmaking, such as settlement and dismissal, and by considering the factual circumstances of each case.

D. *Petitioners' Contingency Fee Agreements*

Based on my review of California Supreme Court authority and the decisions of federal and state courts, I believe that the court must evaluate the propriety of a contingency fee agreement between a public entity and private counsel in a public nuisance abatement action on a case-by-case basis. The factual circumstances of each case and the terms of each contingency fee agreement should be reviewed to determine whether "the prosecutor's *discretionary decisionmaking* has been placed within the influence or control of an interested party" (*Hambarian*, *supra*, 27 Cal.4th at p. 841), or is subject to "conflicting personal interests" (*Greer*, *supra*, 19 Cal.3d at p. 267). If so, the contingency fee agreements must be barred because the agreements are "antithetical to the standard of neutrality that an attorney representing the government must meet when prosecuting a public nuisance abatement action." (*Clancy*, *supra*, 39 Cal.3d. at p. 750.)

Applying this test, I agree with the majority that, based on the record in this original proceeding, the current contingency fee agreements are not antithetical to the standard of neutrality that a government attorney must meet in a public nuisance abatement action. Here, the terms of the contingency fee agreements expressly provide that the government attorneys retain "complete control" of the litigation, including, in some instances, "all decision making authority and responsibility." It is therefore reasonable to assume at this point in the litigation that the government attorneys intend to retain control over all discretionary decisionmaking. Moreover, the factual circumstances do not include a pending or anticipated criminal prosecution arising from the alleged public nuisance, and therefore the bar on contingency fee agreements in criminal prosecutions (*Clancy*, *supra*, 39 Cal.3d at p. 748) is not implicated. For these reasons, I believe that a contingency fee agreement is permissible in the present public nuisance abatement action and that it is not likely, under the current terms of the petitioners' contingency fee agreements, that the requirement of prosecutorial neutrality in public nuisance abatement actions will be violated.

In reaching this conclusion, I recognize the trial court's concern that "as a practical matter, it would be difficult to determine (a) how much control the government attorneys must exercise in order for a contingent fee arrangement with outside counsel [to] be permissible, (b) what types of decisions the government attorneys must retain control over, *e.g.*, settlement or major strategy decisions, or also day-to-day decisions involving discovery and so forth, and (c) whether the government attorneys have been exercising such control throughout the litigation or whether they have passively or blindly accepted recommendations, decisions, or actions by outside counsel."

However, as I have stated, the California Supreme Court has instructed that the decisions over which the government attorneys must retain control in a public nuisance abatement action are the discretionary decisions. In the public prosecutor context, our Supreme Court has observed that the prosecutor "has broad discretion over the entire

course of the criminal proceedings, from the investigation and gathering of evidence, through the decisions of whom to charge and what charges to bring, to the numerous choices at trial to accept, oppose, or challenge judicial rulings." (*Hambarian*, *supra*, 27 Cal.4th at p. 840.) In *Clancy*, the court stated that " '[t]he prosecutor's discretionary functions are not confined to the period before the filing of charges . . . A district attorney may thus prosecute vigorously, but both the accused and the public have a legitimate expectation that his [or her] zeal, as reflected in his [or her] tactics at trial, will be born of objective and impartial consideration of each individual case.' " (*Clancy*, *supra*, 39 Cal.3d at p. 749, fn. 4.) With respect to eminent domain actions, the court has emphasized that " '[a] government lawyer in a civil action . . . should not use his [or her] position or the economic power of the government to harass parties or to bring about unjust settlements or results." (*City of Los Angeles v. Decker*, *supra*, 18 Cal.3d at p. 871.)

Thus, as emphasized in *Clancy* and *Decker*, it is the consequences of discretionary decisionmaking, rather than the details of each decision, that are significant in determining whether the standard of neutrality has been met in the litigation of a public nuisance abatement action. (*Clancy*, *supra*, 39 Cal.3d at p. 749, fn. 4; *City of Los Angeles v. Decker*, *supra*, 18 Cal.3d at p. 871.) Where zealous representation of the government by private counsel has a result that is just and consistent with the public interest, and the conduct of the litigation is "born of objective and impartial consideration," the trial court may reasonably determine that the government attorneys have maintained control of the discretionary decisionmaking and therefore prosecutorial neutrality has been preserved.

The trial court also has an important oversight role in ensuring prosecutorial neutrality, because the court has the "inherent power to review attorney fee contracts and to prevent overreaching and unfairness." (*Roa v. Lodi Medical Group, Inc.*, *supra*, 37 Cal.3d at p. 933.) Thus, as a federal district court has noted, " ' "[A]n attorney's right

to contract for a contingent fee is not completely beyond judicial control." A lawyer is first an officer of the court, and as such his [or her] commercial contractual rights must yield to his [or her] duty.' [Citation.]" (*Sarei v. Rio Tinto PLC* (C.D. Cal. 2002) 221 F. Supp.2d 1116, 1168; see also *State of North Dakota v. Hagerty* (N.D. 1998) 1998 N.D. 122, 580 N.W.2d 139, 148 [court's inherent power to supervise attorney fees].) Thus, the propriety of a contingency fee agreement may be raised at any time in the litigation, whether by a motion for disqualification or other procedural means such as the "motion to bar payment of contingent fees to private attorneys" that was filed in the case at bar.

Finally, because the decisions of the California Supreme Court, the federal courts and other state courts support my view that the propriety of a contingency fee agreement in a public nuisance abatement action must be determined on a case-by-case basis, I do not believe that the language of the contingency fee agreement is the only factor to be considered. Other significant factors must also be considered. For example, there may be public nuisance abatement actions in which parallel criminal prosecutions are pending or anticipated, because as the *Clancy* court noted, "Public nuisance abatement actions . . . often coincide with criminal prosecutions. These actions are brought in the name of the People by the district attorney or city attorney. (Code Civ. Proc., § 731.) A person who maintains or commits a public nuisance is guilty of a misdemeanor. (Pen. Code, §372.)" (*Clancy*, *supra*, 39 Cal.3d at p. 749, fn. omitted.) Another important factor that must be considered is the conduct of plaintiffs' counsel, which may reveal whether the government attorneys' discretionary decisionmaking has been placed within the influence or control of an interested party (*Hambarian*, *supra*, 27 Cal.4th at p. 841), or is subject to conflicting personal interests (*Greer*, *supra*, 39 Cal.3d at p. 267).

Thus, the propriety of a contingency fee agreement in a public nuisance action must be evaluated by careful consideration of the many important factors in each case, including the factual circumstances, the terms of the contingency fee agreement, and the conduct of plaintiff's counsel, because, as the *Clancy* court stated, "The justification for

the prohibition against contingent fees in criminal actions extends to certain civil cases." (*Clancy*, *supra*, 39 Cal.3d at p. 748.)

Therefore, based on my review of the factual circumstances in this case and the terms of the contingency fee agreements, I would conclude that the California Supreme Court's decision in *Clancy*, *supra*, 39 Cal.3d 740 does not bar the public entity plaintiffs in this case from retaining private counsel under their current contingency fee agreements to assist the government attorneys in the litigation of this public nuisance abatement action

I recognize, however, that the issue of the circumstances under which public entities may properly retain private counsel under contingency fee agreements to assist in the litigation of public nuisance abatement actions is of great public significance. For this reason, I would respectfully invite the California Supreme Court to review this issue and to provide guidance to the courts and public entities in this important and developing area of the law.

BAMATTRE-MANOUKIAN, ACTING P.J.

County of Santa Clara v. Superior Court (Atlantic Richfield, et al.)
H031540

Trial Court:	Santa Clara County Superior Court
Trial Judge:	Honorable Jack Komar
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Santa Clara County, et al. v. Superior Court (Atlantic Richfield Company, et al.)
H031540

COPY

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

COUNTY OF SANTA CLARA, et al.,
Petitioners,
v.
THE SUPERIOR COURT OF SANTA CLARA COUNTY,
Respondent;
ATLANTIC RICHFIELD COMPANY, et al.,
Real Parties in Interest.

H031540
Santa Clara County No. CV788657

BY THE COURT:

The motion requesting the court consider petition for rehearing is denied. The clerk of this court is directed to strike the filing of the motion for request for judicial notice filed April 28, 2008.

Date: APR 30 2008

MIHARA, J. Acting P.J.

AGREEMENT FOR LEGAL SERVICES

THIS AGREEMENT, made and entered into this 1st day of June, 1983, by and between the CITY OF CORONA, a municipal corporation of the State of California ("CITY"), and JAMES J. CLANCY, ESQ., Attorney at Law, 9055 La Tuna Canyon Road, Sun Valley, California 91352 ("ATTORNEY").

W I T N E S S E T H:

Recitals:

1. CITY desires to employ an attorney at law to assist the City Attorney in the event that the City Council of the CITY should determine to undertake litigation to abate certain conditions within the CITY, determined by the Council to be public nuisances, or to defend the CITY if it should be named as a party defendant in any action or actions or proceeding or proceedings arising from such determination by the Council, or testing the power of the CITY or the Council so to do, or litigation otherwise arising out of Ordinance No. 1689 of the CITY.

2. ATTORNEY is licensed to practice law in the State of California, and desires to undertake said employment.

WHEREFORE, in consideration of their mutual covenants and agreements, hereinafter contained, and subject to the terms and conditions hereof, the parties hereto do hereby agree as follows:

A. Employment of Attorney

CITY hereby agrees to employ attorney, for the fees hereafter specified, to assist the City Attorney of CITY, when and

requested by said City Attorney to do so, in connection with igation to abate certain conditions within the CITY, deter-ed by the Council under the provisions of Ordinance No. 1689 be public nuisances, or to defend the CITY if it should be ed as a party defendant in any action or actions or proceeding proceedings arising from any such determination by the Coun-, or testing the power of CITY or the Council to do so, or erwise arising out of Ordinance No. 1689 of the CITY. ATTOR- accepts said employment and agrees to perform all of such vices as may be requested by the City Attorney of the CITY in ely and efficient manner.

B. Payment For Services Rendered

CITY agrees to pay to Attorney, and ATTORNEY agrees to cept from CITY, as and for payment in full for all of said vices, such sum of money as shall be determined according to following formula:

$60.00 per hour for each hour of ATTORNEY's services, plus of pocket office expenses incident to such employment, pro-ed, however, that with respect to each and every suit under-en by ATTORNEY hereunder which results in a final judgement ainst CITY, said fee shall be reduced to $30.00 per hour, plus of pocket office expenses incident to such employment, and ovided further that said fee of $60.00 shall also be reduced to .00 per hour, plus out of pocket office expenses incident to ch employment, in each and every suit undertaken by ATTORNEY reunder in which CITY is the successful party if and to the

extent that the CITY does not recover its attorney's fees from the unsuccessful party or parties.

C. Control of Litigation

ATTORNEY agrees that each and every case, suit or proceeding in which he undertakes to assist the City Attorney of CITY, as aforesaid, shall be and remain under and subject to the control and direction of said City Attorney or the City Council of CITY at all stages, and that he shall at all times keep said City Attorney informed of all matters pertaining thereto. ATTORNEY further agrees that if and when his employment hereunder is terminated by CITY as hereinafter specified, he shall return to said City Attorney any and all files then in his possession concerning each and every case, suit or proceeding in which CITY is a party, whether the same be then reduced to final judgement or not.

D. Attorney An Independent Contractor

It is mutually agreed by and between the parties that in the performance of his covenants hereunder ATTORNEY is and shall be an independent contractor and not an officer or employee of CITY.

E. Term of Agreement

The term of this Agreement shall commence on the date first hereinabove written, and shall end on a date in the future, which shall be not less than thirty (30) days from and after the date when CITY informs ATTORNEY, in writing, addressed to ATTORNEY at his address aforesaid, deposited in the United States mail, postage prepaid, or when ATTORNEY informs CITY in writing, addressed to the City Attorney, 4200 Orange Avenue, Riverside, California

of its or his intention to terminate this Agreement.

WITNESS WHEREOF, the parties hereto have executed this
ht the day and year first above written.

CITY OF CORONA
A municipal corporation
State of California

By _____
Mayor

_____
erk of the City of
California

D AS TO FORM:

_____
torney

JAMES J. CLANCY, ESQ.

By _____
"ATTORNEY"

PROOF OF SERVICE

California Supreme Court

County of Santa Clara, et al. v. Atlantic Richfield Company, et al.

(Court of Appeal, Sixth District Case No. H031540)

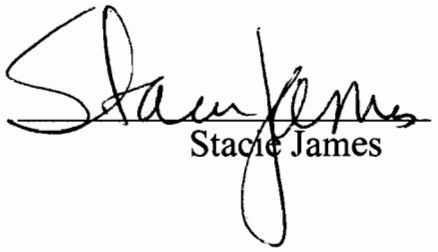
I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 777 South Figueroa Street, 44th Floor, Los Angeles, California 90017-5844. I am readily familiar with Arnold & Porter's practices for the service of documents. On **May 19, 2008** I served or caused to be served a true copy of the following document(s) in the manner listed below.

PETITION FOR REVIEW

☒ **BY MAIL** I placed such envelope with postage thereon prepaid in the United States Mail at 777 South Figueroa Street, 44th Floor, Los Angeles, California 90017-5844. Executed on **May 19, 2008** at Los Angeles, California to:

[SEE ATTACHED SERVICE LIST]

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed at Los Angeles, California, on **May 19, 2008.**



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