Supreme Court Co

S 163681

IN THE SUPREME COURT OF CALIFORNIA

COUNTY OF SANTA CLARA, et al.,

Plaintiffs/Petitioner,

vs.

THE SUPERIOR COURT OF SANTA CLARA COUNTY,

Respondent;

ATLANTIC RICHFIELD COMPANY, et al.,

Defendants/Real Parties in Interest.

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

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES

OTHER AUTHORITIES

STATEMENT OF ISSUE

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?

INTRODUCTION

The Court of Appeal's decision in this case is inconsistent with the core principles of ethics and due process expressed by this Court in *People ex rel. Clancy v. Superior Court* (1985) 39 Cal.3d 740 (*Clancy*) in holding that the government's attorney in a civil public nuisance action cannot have a personal financial stake in the outcome of the case. It has long been established that, in deciding whether and how to prosecute criminal proceedings, the government's lawyers must remain free from any personal pecuniary interest in the outcome of the proceedings, including a contingent fee interest. In *Clancy*, this Court held the same is true with respect to other classes of cases, such as public nuisance actions, in which an attorney must balance conflicting interests in an effort to achieve public justice.

The Court of Appeal's exception to *Clancy* for outside contingent fee counsel who are contractually subordinate to and under the control of a staff attorney cannot be squared with the absolute

neutrality demanded of any lawyer representing the government in the exercise of its sovereign powers. Regardless of the degree of control a government staff lawyer might intend or attempt to exercise as co-counsel, the contingent fee lawyer's financial incentive taints the representation and erodes public confidence in the impartiality and integrity of the prosecutorial decisions made on the public's behalf. As the *Clancy* decision emphasized, neutrality in actions in which the government is exercising its sovereign powers is "essential to the proper function of the judicial process as a whole," without which "the concept of the rule of law cannot survive." (*Clancy*, *supra*, 39 Cal.3d at p. 746.)

The exception formulated by the Court of Appeal not only is inconsistent with *Clancy*, but also is unworkable. As the Court of Appeal recognized and the trial court foresaw, an exception permitting contingent fees for attorneys who purportedly "merely assist[] government attorneys," "serv[e] in a subordinate role" and "lack any decision-making authority or control," would require courts to conduct an on-going inquiry into the nature of the control and supervision over the litigation and how much control is enough to permit the exception to apply. That inquiry would require scrutiny of the relationship between the supervising government attorney and his outside counsel, notwithstanding the attorney-client and work product privileges.

The few authorities from other jurisdictions cited by the Court of Appeal do not support an exception to *Clancy*. None addresses the role of government counsel using sovereign power in a public

nuisance action. And, none challenges or even addresses the foundational principles upon which this Court's rule rests.

Finally, an exception permitting outside government counsel to profit personally from a successful public nuisance prosecution would violate the Due Process Clause of the United States Constitution. Allowing outside contingent fee counsel to use sovereign power to achieve personal financial gain at the expense of another citizen is antithetical to due process of law. This Court in *Clancy* recognized as much, when it cited the leading United States Supreme Court authorities barring judicial officers from having any, even *de minimis*, personal financial stake in a successful prosecution.

This Court should reaffirm *Clancy* and its bright-line rule that prohibits government entities from hiring outside counsel on a contingent fee basis to prosecute public nuisance actions.

STATEMENT OF FACTS

A. The Government Public Nuisance Prosecutions

In this case, a group of public entities are prosecuting a public nuisance action against a group of companies that lawfully made and sold lead pigments many decades ago. Three of the governmental entity plaintiffs (Santa Clara, San Francisco, and Oakland) initially brought an action under several different theories, including public nuisance in their alleged capacity as "representatives of the People of the State of California pursuant to California Code of Civil Procedure section 731." (See Petitioners' Appendix of Exhibits (Petitioners' Appx.), p. 5 [Third Am. Compl., ¶ 2a].) On the public nuisance claim, these 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].)

The trial court dismissed these public nuisance claims on the pleadings. The Court of Appeal subsequently overturned the demurrer in part and remanded. (*County of Santa Clara v. Atlantic Richfield Co.* (2006) 137 Cal.App.4th 292.) The trial court then granted plaintiffs' request for 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 from all buildings within their jurisdictions. (Petitioners' Appx., p. 86.)

Ten cities and counties now prosecute this public nuisance action: the City and County of San Francisco; the counties of Santa Clara, Solano, Alameda, Monterey, San Mateo, and Los Angeles; and the cities of Oakland, San Diego, and Los Angeles. (Court of Appeal Typed Opinion ("Typed Opinion"), p. 2.) The public nuisance claims raise important 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.

B. Government Counsel of Record's Contingent Fee Agreements

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

monetary recovery in the action. (Petitioners' Appx., p. 230.) San Francisco pays no "out-of-pocket" litigation costs or attorneys' fees; all costs and fees are advanced by the outside counsel. (*Ibid.*) 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, except Los Angeles, 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"].)[1]

C. The Trial Court's Order Granting Defendants' Motion To Bar Contingent Fees, And The Court Of Appeal Opinion Reversing That Order

One month after plaintiffs informed the trial court of their decision to limit this action solely to the remanded public nuisance claims, defendants filed a motion to bar payment of contingent fees based on the principles articulated by this Court in *Clancy*. (Petitioners' Appx., p. 114.) The trial court granted that motion, ruling that plaintiffs are precluded under the holding of *Clancy* "from retaining outside counsel under any agreement in which the payment

[1] At present, the City and County of Los Angeles have not retained outside counsel. (See Typed Opinion, p. 10 fn.9.)

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 acknowledged that *Clancy* applies to public nuisance actions and that the prosecution of such actions requires absolute neutrality. Nonetheless, it created an exception to *Clancy* for any outside contingent fee counsel retained under a contract in which the government purports to maintain "final authority" over the litigation. (Typed Opinion, pp. 9, 12.)

STANDARD OF REVIEW

Questions of law that do not involve the resolution of disputed facts are subject to *de novo* review. (*Prof'l Eng'rs in California Gov't v. Kempton* (2007) 40 Cal.4th 1016, 1032; *Kavanaugh v. West Sonoma County Union High Sch. Dist.* (2003) 29 Cal.4th 911, 916 [where "the trial court's decision did not turn on any disputed facts," the trial court's decision "is subject to de novo review"].)

No factual dispute underlies the trial court's or the Court of Appeal's decisions below. There is no dispute that plaintiffs hired counsel of record on a contingent fee basis in this public nuisance action and that the retention agreements state that the plaintiff government entities retain "final authority" over the lawsuit. The only question is whether such an arrangement is improper as a matter of law.

ARGUMENT

I. The Court Should Reject The Court Of Appeal's "Subordinate Lawyer" Exception To *Clancy* Permitting Outside Government Counsel To Profit From Successful Use Of The Government's Sovereign Power To Prosecute A Public Nuisance Action

A. This Court's Decision In *Clancy* Was Based On Enduring Fundamental Values Not Disputed In This Case

Historically, contingent fee arrangements were disfavored or even banned by United States courts. (E.g., *Butler v. Legro* (1882) 62 N.H. 350, 352 [voiding contingent fee agreement as "contrary to public justice and professional duty"].) They have since gained acceptance in some instances where the contingent fee lawyer represents private or proprietary interests.

Different rules apply, however, where a lawyer represents the government as sovereign prosecuting a case in the name of the public interest. In such a case, the need to preserve absolute financial neutrality of the government's lawyer has long been recognized. For example, in *Berger v. United States* (1935) 295 U.S. 78, 88, the United States Supreme Court emphasized that an attorney representing the government in a criminal matter has a higher ethical duty than one who represents a private party. The attorney's duty is not to win at any cost, but, rather to do justice: "The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling 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." (*Ibid.*)

Against the backdrop of this core principle guiding sovereign government prosecution, this Court in *Clancy* articulated a rule of absolute neutrality -- a prohibition against any personal financial stake in the outcome -- for government counsel in public nuisance actions. The analysis in *Clancy* begins with a clear statement of the principles that drive the need for absolute neutrality. This Court said:

> Thus a prosecutor's duty of neutrality is born of two fundamental aspects of his employment. First, he is a representative of the sovereign; he must act with the impartiality required of those who govern. Second, he has the vast power of the government available to him; he must refrain from abusing that power by failing to act evenhandedly.

(*Clancy*, *supra*, 39 Cal.3d at p. 746.)

The Court noted that "'the contingent fee is generally considered to be prohibited [in] the prosecution and defense of criminal cases. . . . [T]he contingent element [is] against public policy because it tend[s] to bring about conviction regardless of the prosecutor's primary duty to see that justice [is] done." (*Clancy*, *supra*, 39 Cal.3d at p. 748 [citing MacKinnon, Contingent Fees for Legal Services (1964) p. 52].)[2] But the Court further noted that the

[2] As one professor of law and public policy notes, "To comprehend the problematic nature of the situation brought on by government's use of private contingent fee lawyers, one need only hypothesize a situation in which governmental prosecutors are given a financial arrangement in which they are to be paid when and only when they obtain a conviction. It is difficult to imagine an arrangement more rife with danger, cynicism and potential abuse than this one, and therefore wholly unacceptable in a constitutional democracy where government is accountable to the electorate and where an implicit social contract controls the relationship between government and the individual." (Redish, *Private Contingent Fee Lawyers and Public Power: Constitutional and Political Implications*, Northwestern Law Research Roundtable on Expansion of Liability Under Public Nuisance (2008) pp. 4-5, available at <http://www.law.northwestern.edu/searlecenter/papers/Redish_revised.pdf> (as of Oct. 1, 2008).)

duties inherent in exercising sovereign power "*are not limited to criminal prosecutors*." (*Id.* at p. 746, emphasis added.) The use by a lawyer of the government's sovereign power to enrich himself from the property of a citizen violates the neutrality rule even outside the context of criminal proceedings. (*Id.* at p. 748.)

There is and can be no dispute that public nuisance suits brought by the government in its sovereign capacity fall into that "class of . . . actions" in which the representative of the government must remain "absolutely neutral." (*Clancy*, *supra*, 39 Cal.3d at p. 748.) Public nuisance actions brought by the government have an undeniable "public interest aspect" that require "balancing [the] interests" of the public at large and the persons with a direct interest in the outcome of the case. (*Id.* at p. 749.)

Since *Clancy*, this Court has confirmed the balancing of interests required in public nuisance actions. Determining whether a potential public nuisance warrants redress involves "comparing the social utility of an activity against the gravity of the harm it inflicts, taking into account a handful of relevant factors." (*People ex rel. Gallo v. Acuna* (1997) 14 Cal.4th 1090, 1105.) In undertaking this balance, there must be "equal dignity, at least as far as the protection of equity is concerned, of private, property-based interests and those values that are in essence collective, arising out of a shared ideal of community life and the minimum conditions for a civilized society." (*Id.* at p. 1107.)

Accordingly, "*[a]ny financial arrangement that would tempt the government attorney to tip the scale [in such cases] cannot be tolerated.*" (*Clancy*, *supra*, 39 Cal.3d at p. 749, emphasis added.)

Because a contingent fee arrangement creates such a temptation, it 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.)

The constitutional and ethical principles upon which this Court relied apply to any attorney who could profit by successfully prosecuting a case brought pursuant to the government's sovereign powers.[3] Indeed, this Court expressly held that the employment status of the counsel was irrelevant:

> It is true that the retainer agreement between the City and Clancy provides that Clancy is to be "an independent contractor and not an officer or employee of City." However, 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*, *supra*, 39 Cal.3d at p. 747, emphasis added.)

[3] In addition to *Berger*, this Court relied on other leading United States Supreme Court constitutional authorities. (*Clancy*, *supra*, 39 Cal.3d at pp. 746-47 [citing *Tumey v. Ohio* (1927) 273 U.S. 510 and *Ward v. Village of Monroeville* (1972) 409 U.S. 57]; see also *post*, Section II.) The Court also cited with approval various American Bar Association rules of professional responsibility and ethics concerning government prosecutions. Those rules have imposed upon attorneys wielding sovereign power an affirmative ethical obligation to pursue justice, not victory. (See, e.g., ABA Model Code of Prof. Responsibility, EC 7-13 ["The responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict"]; see also ABA Standards Relating to the Prosecution Function, 1.2(c) ["The duty of the prosecutor is to seek justice, not merely to convict"].)

B. The Court Of Appeal's "Subordinate Lawyer" Exception For Outside Counsel Is Antithetical To *Clancy* And Would Gut The Neutrality Rule

The Court of Appeal recognized that this Court in *Clancy* adopted a requirement of absolute neutrality and that this requirement applies to public nuisance prosecution. (E.g., Typed Opinion, p. 10 ["The only remaining question is whether the limited role of private counsel renders inapplicable *Clancy*'s absolute neutrality requirement"].) In reversing the trial court's order precluding the contingent fee contracts in this case, however, the Court of Appeal failed to grasp the foundation for the rule that requires it be absolute. (*Id.* at p. 11 ["the binding authority of *Clancy* is *limited to the facts upon which the California Supreme Court rested its holding*"], emphasis added.) The Court of Appeal created an exception, depending on the facts of each case, for an outside contingent fee lawyer who is supposedly subordinate to another lawyer in control, allowing such control to "cure" the taint from the outside counsel's financial stake in the outcome. (*Id.* at pp. 11-12.)

Nothing in the constitutional or ethical underpinning of the rule permits such an exception, because the exception does nothing to address the problems inherent in injecting a personal profit motive into the careful balancing of interests needed for proper investigation, negotiation, and prosecution of public claims. Nor can the exception restore the loss of public confidence that occurs when the public sees its representation handed over to outside attorneys who will profit only if they win the case.

Such an exception would, in fact, swallow the rule. In all lawyer and client relationships, the client is "in control" and the

lawyer is "subordinate" to that control. (E.g., *Fracasse v. Brent* (1972) 6 Cal.3d 784, 790 [a client and attorney have a "unique relationship" where the client is in control such that the client's "power to discharge an attorney, with or without cause, is absolute"].) The lawyer is an agent to the client principal. And, the chief legal officer of any government is technically "in control" of the lawyers who are his or her subordinates. The mere fact that all lawyers are subject to their client's control and that all subordinate lawyers are under the control of their ultimate superior cannot excuse all of them from the constitutional and ethical constraints of *Clancy*. Indeed, it cannot excuse any of them.

Equally unavailing is the Court of Appeal's attempt to draw a distinction between outside contingent fee counsel (who the court held merely "assist" and therefore can be permitted a direct financial stake in the outcome) and inside counsel (who must adhere to the ethical standards expressed in *Clancy*). The Court of Appeal adopted the rubric of "private counsel," referring to the government's contingent fee counsel by that label more than fifty times. The Court of Appeal summarized this supposed distinction between inside and outside counsel as follows: "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' . . . ." (Typed Opinion, p. 11, emphasis [underlining] added.)

But the Court of Appeal's repeated characterization of government counsel as mere "private counsel" and the unsupported

assertion that those "private" counsel of record are not acting for their client governments neither distinguishes *Clancy* factually nor makes the foundational bases of the *Clancy* rule inapplicable here. Most importantly, like attorney Clancy, contingent fee counsel here are retained as attorneys to represent the public interests on behalf of, and in the name of, the governments. (See *Diamond v. General Motors Corp.* (1971) 20 Cal.App.3d 374, 378 [action to abate a public nuisance "is the business of the sovereign, acting through its law officers"].) The Santa Clara contingency fee agreement, for example, expressly provides:

> Special Counsel are retained to provide legal services to the County of Santa Clara through its Office of County Counsel for the purpose of seeking injunctive and other relief, including restitution, disgorgement of profits, abatement, remediation and damages against the Lead Defendants and related entities . . . .

(Petitioners' Appx., p. 434.)

Similarly, like attorney Clancy, contingent fee counsel here are independent contractors of the government. For example the Santa Clara contingency fee agreement provides:

> Nature of Relationship: The County of Santa Clara acknowledges that by this Agreement, Special Counsel are retained as attorneys and that neither Special Counsel nor their members or employees become officers or employees of the County of Santa Clara. Special Counsel shall be deemed at all times to be independent contractors and shall be wholly responsible for the manner in which they perform the services required of them . . . .

(Petitioners' Appx., p. 440.) But, just as in *Clancy*, the heightened ethical requirements of contingent fee counsel performing government

functions in this case cannot be avoided "merely by declaring [they are] not . . . public official[s]." (*Clancy*, *supra*, 39 Cal.3d at p. 747.)

In *Clancy*, the City of Corona and Mr. Clancy raised the "control" argument, but the argument had no effect on the Court's holding. The *Clancy* agreement stated:

> A. Employment of Attorney
> CITY hereby agrees to employ attorney, for the fees here-in-after specified, *to assist the City Attorney of CITY, when and as requested by said City Attorney to do so*, in connection with litigation to abate certain conditions within the CITY, determined by the Council under the provisions of Ordinance No. 1689 to be public nuisances . . . .
>
> * * *
>
> 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 dated May 19, 2008 (RJN), Exh. A at pp. 12-14 [Agreement for Legal Services, pp. 1-3], emphasis added.)

As the City of Corona asserted, "[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.) Based on this purported control, the City argued that the agreement was not "against public policy" and should be upheld. (*Id.*, Exh. C at pp. 22-23.)

None of this "control" evidence or argument made any

difference in the outcome of *Clancy*, nor should it have. The propriety of giving an attorney representing the government in a public nuisance action a profit stake in the outcome of the litigation does not turn on whether that attorney is being supervised by a neutral attorney, because *each* attorney representing the government in a public nuisance action is and should be held to the same neutrality standard.

Attorneys are not retained to perform ministerial functions. They necessarily make strategic and tactical decisions, no matter who retains supervisory responsibility or ultimate authority. Plaintiffs themselves acknowledge this fact. They hired their outside counsel expressly because those attorneys have expertise in this type of case, and plaintiffs are willing to pay a significant amount (*i.e.*, 17%) of any recovery for that expertise. (See Petitioners' Appx., p. 234 ["The Special Attorneys are expressly employed because of their unique skills, ability, and experience . . ."].)[4] *Clancy* teaches that whenever the government retains such outside counsel to prosecute public enforcement actions on a contingent fee basis, the neutrality and impartiality required of the government's strategic and tactical

[4] The trial court also recognized this when addressing the role of the contingent fee attorneys:

> 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' Appx., p. 814:6-14.)

decisionmaking is necessarily compromised by outside counsel's financial interest in the outcome of the litigation.

C. A "Subordinate Lawyer" Exception Would Be Unworkable And Impossible To Monitor Or Enforce

The exception created by the Court of Appeal would be impossible to apply. The trial court succinctly identified the enforcement problems in its order:

> [A]s 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.

(Petitioners' Appx., p. 794 [Order, p. 3:11-17].)

These enforcement issues already have been highlighted in this case. When defendants attempted to obtain information from plaintiffs regarding their purported "control" over the outside 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")].)

In response to defendants' motion in the trial court, however, plaintiffs submitted numerous self-serving declarations purporting to

describe the relationship between plaintiffs and their counsel. The generalities in these declarations are no substitute for evidence when the issue is whether plaintiffs' sophisticated outside counsel have used their "unique skills, ability, and experience" to influence the direction of the litigation to serve their own financial interests.

The Court of Appeal's theory is apparently that a trial court can review the proceedings while they are ongoing to determine as a factual matter whether contingent fee counsel is adequately supervised, and the proceedings are therefore sufficiently neutral. This would require a continuous intrusive inquiry. But, even then, how would a trial court and the adversaries ever be able to discover the "facts" necessary to make such a determination? Realistically, obtaining the information necessary to test sufficiency of control would be exceedingly difficult, if possible at all.

The Court of Appeal itself recognized that, if a subordinate lawyer exception were to stand, the parties would then engage in a factual dispute regarding the sufficiency of control exercised by the government "supervisor." (See Typed Opinion, p. 16 & fn.11.) What makes this result even more problematic is that the court indicated the *defendant* has the responsibility to police the relationship between the government and its contingent fee counsel. Asserting, "[t]he 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," the court then stated that if the defendants "acquire evidence that the private attorneys are improperly exercising control over th[e] action," they will "no doubt . . . seek disqualification of the . . . private attorneys

. . . ." (*Ibid.*) Such evidence would be exceedingly difficult to come by, however, because plaintiffs would continue to attempt to withhold any evidence indicating a lack of proper control on grounds of attorney-client privilege and work product protection.

The United States Supreme Court has recognized the impossibility of monitoring a conflict of interest once it is found:

> 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" 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, 812-813 (plurality), emphasis in original.)

D. The Exception Would Erode Confidence In The Legal System

In *Clancy*, the Court recognized that the duty of absolute neutrality for prosecutors is critical to more than simply the "fair outcome for the litigants" in the particular case. The requirement that the prosecutor remain impartial,

> 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. [Citation.]

> 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,* 39 Cal.3d at p. 746.)

Members of the public deserve to know that their lawyers are acting with objectivity in balancing competing public interests, and they should not have to wonder whether outside attorneys are being held to that standard. Attorneys who act on behalf of the people "should avoid all conduct which might lead the layman to conclude that the attorney is utilizing his public position to further his . . . personal interests. [Citations.]" (*Clancy*, *supra*, 39 Cal.3d at p. 747.) But, as noted above, the very fact that outside counsel has been hired on a contingent fee basis necessarily erodes the neutrality and impartiality of the government's prosecution. Moreover, even if a subordinate lawyer exception were adopted, there would be no sufficient way for the public to know if the proper level of objectivity has been met, because the facts needed to make that determination would be unavailable to it.[5]

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[5] Bright-line prophylactic rules, such as that contained in *Clancy*, benefit the government as well as the public. (See, e.g., *Arizona v. Roberson* (1988) 486 U.S. 675, 681-82 [the "virtues" of a bright-line rule include "providing 'clear and unequivocal' guidelines to the law enforcement profession"]; see Redish, *supra*, at p. 5 ["Actual impropriety in a specific instance will generally be difficult to unearth. Indeed, it is quite conceivable that the government attorney herself would be unaware of the impact of the motivational twist on her behavior. It is for that reason that we generally establish *prophylactic* rules to ensure adherence to the public interest by our government officers"], emphasis in original.)

In short, no amount of supervision by the government and no amount of review of contingent fee counsel's performance could ever cure the appearance of impropriety that exists from the moment contingent fee counsel are engaged. As the United States Supreme Court noted, "[r]egardless of whether the appointment of private counsel in th[e] case result[s] in any prosecutorial impropriety," where the attorney representing the government has an "actual conflict" of interest, the appointment of such counsel "at a minimum create[s] *opportunities* for conflicts to arise, and create[s] at least the *appearance* of impropriety." (*Young*, *supra*, 481 U.S. at pp. 805-07, emphasis in original.) Thus, even *attempting* to allow contingent fee counsel to proceed under a control exception would undermine public confidence in the neutrality of the government's prosecution of public nuisance and other similar enforcement actions.

The need to avoid any suggestion that our government entities have dispensed with appropriately neutral counsel is particularly compelling in this public nuisance action. Plaintiffs seek to have declared as public nuisances potentially millions of buildings within their jurisdictions that contain lead paint, without regard to whether these buildings contain only intact, well-maintained lead-based paint.[6]

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[6] Legislative and administrative bodies that have considered the issue, including in California, do not define the mere presence of lead paint as a hazard to be abated. (See, e.g., 15 U.S.C. § 2681 ["Lead-based paint hazard" defined as "lead-contaminated *paint that is deteriorated* or present in accessible surfaces, friction surfaces, or impact surfaces . . ."], emphasis added; Cal. Health & Saf. Code § 17920.10 ["For purposes of this part, 'lead hazards' means *deteriorated* lead-based paint [of a specified size] . . ."], emphasis added; Cal. Health & Saf. Code § 105251, adopting Cal. Code Regs., tit. 17, § 35037 ["'Lead hazard' means *deteriorated* lead based paint . . ."], emphasis added.)

Plaintiffs' effort to have lead paint in all of these buildings abated by defendants could have serious consequences for millions of property owners. It may affect their properties' market value and their ability to obtain rent, financing, and insurance on their properties. It may require owners to leave or close their homes and businesses for extended periods of time during lead abatement procedures. Moreover, it may trigger criminal liability against those owners as the persons who have maintained the nuisance. (See Cal. Pen. Code § 372 ["Every person who maintains or commits any public nuisance . . . or who willfully omits to perform any legal duty relating to the removal of a public nuisance, is guilty of a misdemeanor"]; see also *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"].)[7]

In light of a statutory framework that does not define intact lead paint to be a health hazard, a "just balance" will have to be struck as this case proceeds among the interests of the defendants, who have not sold lead pigment or lead-based paint for architectural use for decades; the owners of affected buildings; and the general public in an era of steadily-declining blood lead levels in children aided by comprehensive government programs.[8] The interests of justice and

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[7] Still other statutes impose the responsibility for abatement of public nuisances on the owner of the property. (E.g., Cal. Civ. Code § 3483; Cal. Health & Saf. Code §§ 17980, 105256(a); Cal. Gov. Code § 25845.)

[8] E.g., President's Task Force on Environmental Health Risks and Safety Risks to Children, Eliminating Childhood Lead Poisoning: A Federal Strategy Targeting Lead Paint Hazards (Feb. 2000), p. 2, available at <http://www.cdc.gov/nceh/lead/about/fedstrategy2000.pdf> (as of Oct. 1, 2008) ["children's blood lead levels have declined over 80% since the mid-1970's"].

the public's confidence in the impartiality of government prosecutions require that this balancing occur without the concern that outside counsel retained on a contingent fee basis are influencing the decisions and litigation for their own personal pecuniary motives.[9]

E. A "Subordinate Lawyer" Exception Is Not Supported By Any Other Authority

In creating its exception to the *Clancy* rule, the Court of Appeal reasoned that other cases support its interpretation. (Typed Opinion, pp. 13-16.) This is incorrect.

The Court of Appeal asserted that this Court's reference in *Clancy* to *Sedelbauer v. State* (Ind.Ct.App. 1983) 455 N.E.2d 1159, "suggests" that this Court contemplated an exception to the neutrality requirement. (Typed Opinion, p. 14.) No such exception was "suggested," because *Sedelbauer* had nothing to do with contingent fee agreements; the language in *Clancy* to which the Court of Appeal referred related not to the contingent fee contract issue, but to another perceived bias of Mr. Clancy, who appeared to have a personal interest in opposing the sale of adult material that was the subject of the nuisance action. (See RJN, Exh. E at p. 29 [Petition for Hearing, p. 7] [arguing that Mr. Clancy, in addition to holding an improper financial stake in the outcome of the litigation, held "an obvious

[9] Any assertion by plaintiffs that the principles articulated by this Court in *Clancy* should not apply here because the government needs the "unique" services of the contingent fee counsel and cannot otherwise pay for them is completely without merit. The due process, ethical, and policy principles expressed in *Clancy* cannot be cast aside merely because a particular government entity argues that it is necessary under the circumstances. (See *Hamdi v. Rumsfeld* (2004) 542 U.S. 507, 532 ["It is during our most challenging and uncertain moments that our . . . commitment to due process is most severely tested; and it is in those times that we must preserve our commitment" to those principles].)

personal interest by virtue of his being an attorney for a Phoenix, Arizona organization that opposes adult material . . ."], emphasis added.)

The *Sedelbauer* court held that a similar personal bias on the part of an outside lawyer who coordinated with government counsel in an obscenity prosecution presented no problem under Indiana law. Nothing in *Sedelbauer* suggests that a contingent fee attorney, who by definition has a direct financial stake in achieving a particular litigation outcome, may properly enter into an attorney-client relationship with the people of California to prosecute public claims.

The Court of Appeal also referred to two tobacco cases in support of its control exception: *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. Neither supports the conclusion that a control exception is consistent with *Clancy*.

In *City and County of San Francisco*, counties in California entered into a contingent fee agreement with outside counsel to handle a case in which the counties asserted federal and civil tort claims against tobacco industry defendants. All of the counties' claims were predicated on the allegation that the defendants' alleged misrepresentations regarding the hazards of smoking caused plaintiffs direct financial injury in the form of health care costs that plaintiffs incurred for the treatment of smokers. (*City and County of San Francisco*, 957 F.Supp. at p. 1134.) The counties did not allege a public nuisance claim or otherwise attempt to assert their sovereign powers as representatives of the "people;" they asserted proprietary

tort claims.

The court held that a contingent fee agreement in such a circumstance was permissible, because the underlying claim "does not raise concerns analogous to those in the public nuisance or eminent domain contexts discussed in *Clancy*." (*City and County of San Francisco*, *supra*, 957 F.Supp. at p. 1135.) Instead, "[p]laintiffs' 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." (*Ibid.*)

Similarly, in *Philip Morris, Inc. v. Glendening*, the state of Maryland retained outside attorneys to act as counsel "in a major tort litigation" to recover costs that the state allegedly incurred to pay for tobacco-related illnesses. (*Glendening*, *supra*, 709 A.2d at p. 1231.) *Glendening* did not involve any claims of public nuisance.

Accordingly, both *City and County of San Francisco* and *Glendening* stand only for the proposition that, when a public entity asserts a proprietary claim of the type that also could be asserted by a private plaintiff, it may retain counsel in the same way a private plaintiff could.[10]

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[10] Recently, the Rhode Island Supreme Court addressed a similar issue, opining that the Rhode Island Attorney General, as a constitutional officer of the State, was "not precluded from engaging private counsel pursuant to a contingent fee agreement" in a public nuisance action so long as the Attorney General maintained absolute and total control over the decision making. (*State v. Lead Indus. Ass'n., Inc.* (2008) 951 A.2d 428, 474-75.) After noting that it was "reluctant to opine on an issue that has become moot" because the entire case should have been dismissed as failing to state a valid public nuisance claim, the Rhode Island Supreme Court also acknowledged that the law in this area is unsettled, and "expressly indicate[d] that [its] views concerning this issue could possibly change at some future point in time." (*Id.* at pp. 469-70, 475 fn.50.)

II. Prosecution Of Public Nuisance Actions By Contingent Fee Counsel Would Violate Due Process

The rule articulated in *Clancy* has a constitutional foundation. Allowing an attorney with a contingent fee interest in the outcome to bring a case exercising the government's sovereign power violates due process of law. Instead of the sovereign wielding its power with absolute neutrality, the sovereign's conduct is tainted by the prospect of its lawyer's personal financial gain. This is not due process of law. As this Court noted, the constitutional basis for the rule traces back to the United States Supreme Court's decision in *Tumey v. Ohio* (1927) 273 U.S. 510. (*Clancy*, *supra*, 39 Cal.3d at p. 747.)

In *Tumey*, the Court considered whether it was proper for a judge trying individuals for violations of the prohibition laws to receive payments based on convictions. (*Tumey*, *supra*, 273 U.S. at pp. 514-15.) While "[a]ll questions of judicial qualification may not involve constitutional validity," the Court concluded that the payment of money to a judge based on the outcome of a case did. (*Id.* at p. 523.) "[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." (*Ibid.*)

Notably, the Court applied this constitutional restriction even though the "substantial pecuniary interest" at issue was a mere $12.

> There are doubtless mayors [the judicial officer] who would not allow such a consideration as $12 costs in each case to affect their judgment in it, but the requirement of due process of law in judicial procedure is not satisfied by the argument that men of the highest honor and the greatest self-sacrifice

> could carry it on without danger of injustice. 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.

(*Tumey*, *supra*, 273 U.S. at p. 532, emphasis added.)

The need to guard against even the possibility of temptation is echoed in *Clancy*. (*Clancy*, *supra*, 39 Cal.3d at p. 749 ["Any financial arrangement that would tempt the government attorney to tip the scale cannot be tolerated"]; see also *Village of Monroeville*, *supra*, 409 U.S. at pp. 58-60 [finding a denial of Due Process where mayor with "responsibilities for revenue production" of town also presided over cases in which defendants' fines were paid into -- and constituted a "major part of" -- the municipal treasury]; *Aetna Life Ins. Co. v. Lavoie* (1986) 475 U.S. 813, 821-25 [holding that Due Process was violated where a judge participated in drafting and issuing an opinion that affected the outcome of the judge's own civil lawsuit in which the judge received a $30,000 monetary settlement].)

The United States Supreme Court has made clear that this constitutional prohibition applies equally to representatives through whom the state exercises sovereign power when prosecuting cases. In *Marshall v. Jerrico, Inc.* (1980) 446 U.S. 238, the Court considered the propriety of permitting administrators who worked for the federal Employment Standards Administration (ESA) first to determine, and then to enforce through prosecution, penalties assessed under the Fair Labor Standards Act when those penalties were paid to the ESA itself. Under such circumstances, the ESA administrator was required to

perform "functions [that] resemble those of a prosecutor . . . ." (*Id.* at pp. 242-43.)

The Court found that, although government attorneys "need not be entirely 'neutral and detached,'" Due Process precludes them from maintaining improper financial incentives to obtain convictions: "[T]he decision to enforce -- or not to enforce -- may itself result in significant burdens on a defendant or a statutory beneficiary, even if he is ultimately vindicated in an adjudication. [Citation.] *A scheme injecting a personal interest, financial or otherwise, into the enforcement process may bring irrelevant or impermissible factors into the prosecutorial decision and in some contexts raise serious constitutional questions.*" (*Marshall*, *supra*, 446 U.S. at pp. 248-50, emphasis added.)

Although the *Marshall* case did not require that the Court state "with precision what limits there may be on a financial or personal interest of one who performs a prosecutorial function," the Court left no doubt that it would violate constitutional principles for a prosecutor to have a direct and substantial financial interest in the outcome of the litigation.[11] (*Marshall*, *supra*, 446 U.S. at p. 250; see also *Vuitton*, *supra*, 481 U.S. at pp. 807 fn.18, 814 (plurality) ["we establish a

[11] In *Marshall*, the amount of fines at issue constituted less than 1% of the agency's entire budget, the ESA traditionally returned more money to the federal government for use in the general treasury than it took in, and the salary of the administrator/prosecutor at issue was "fixed by law." (*Marshall*, *supra*, 446 U.S. at pp. 245, 250-51.) It thus was "plain that no official's salary is affected by the levels of the penalties," and "[n]o government official stands to profit economically from vigorous enforcement of" the labor act. (*Id.* at pp. 245, 250.) The Court therefore held that any improper incentive for the prosecutor was "too remote" and thus there was no Due Process violation. (*Id.* at pp. 250-51.)

categorical rule against the appointment of an interested prosecutor, adherence to which requires no subtle calculations of judgment"]; *Ganger v. Peyton* (4th Cir. 1967) 379 F.2d 709, 713 [violation of the Due Process Clause where private attorney acting as criminal prosecutor also acted as attorney for the wife of the criminal defendant in a related divorce action and thus had a conflict of interest caused by the "possibility that the size of his fee [in the civil action] would be determined by what could be extracted from defendant"].)

This Court itself recently reiterated the constitutional implications of a government attorney's pecuniary interest in the outcome of litigation. In *People v. Vasquez* (2006) 39 Cal.4th 47, the Court addressed whether an assistant district attorney could prosecute a case against the son of another employee in the office. As in *Clancy*, this Court reviewed the historical background of judicial and prosecutorial conflicts addressed by the United States Supreme Court (including *Tumey*, *Marshall*, and *Vuitton*).

The Court highlighted the difference between conflicts generated by "'matters of kinship [and] personal bias'" and a conflict based on a "'direct, personal, substantial, pecuniary interest.'" (*Vasquez*, *supra*, 39 Cal.4th at pp. 63-64 [quoting *Tumey*, *supra*, 273 U.S. at 523].) Imparting "dispositive constitutional importance" to conflicts due to "personal influences" is difficult, because it is impossible for anyone to "completely avoid personal influences on their decisions" and it would "import into constitutional law a set of difficult line-drawing problems." (*Id.* at p. 64.) In contrast, however, "pecuniary conflicts of interest on a judge's *or prosecutor's* part pose

a constitutionally more significant threat to a fair trial . . . ." (*Ibid.*, emphasis added.)

It is impossible for the requirements of Due Process to be satisfied when the representative of the government has a personal financial stake in wielding the state's sovereign power to obtain a particular outcome. Neither the defendant whose interests are directly at issue in a particular case nor the public at large can be assured of a fair outcome in such circumstances. Due Process requires that the balance of interests remain "nice, clear, and true" between the state and those representing it on the one hand, and the defendant on the other. (*Tumey*, *supra*, 273 U.S. at p. 532.) By tipping that balance improperly, a contingent fee arrangement thus precludes the due process of law.

Correcting the Due Process violation created here by the contingent fee arrangements cannot wait until after trial or other resolution of the action. Violations of Due Process cannot be "fixed" later in the case. (See *Village of Monroeville*, *supra*, 409 U.S. at pp. 61-62 [an appeal as a "'procedural safeguard' does not guarantee a fair trial" and it is not "constitutionally acceptable," because a party "is entitled to a neutral and detached [representative of the government] *in the first instance*"], emphasis added.)[12]

[12] 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.)

CONCLUSION

The trial court properly concluded that *Clancy* and the principles upon which it is based preclude plaintiffs from retaining outside counsel under any agreement in which payment of fees and costs is contingent on the outcome of this litigation. In a public nuisance prosecution like this, the government may retain outside counsel of its choosing, but it may not give the outside counsel a financial stake in the outcome. Accordingly, this Court should reverse the decision of the Court of Appeal, vacate the writ of mandate, and remand the action to the trial court with directions that the action proceed pursuant to the trial court's order of April 4, 2007.

Dated: October 6, 2008

Sean Morris

CERTIFICATION OF WORD COUNT

Pursuant to California Rule of Court, Rule 8.504(d)(1), the attached brief, excluding tables and attachments, consists of 8,179 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: October 6, 2008

Sean Morris

Case No. S 163681

CALIFORNIA SUPREME COURT

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

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

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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 a readily familiar with Arnold & Porter's practices for the service of documents. On **October 6, 2008** I served or caused to be served a true copy of the following document(s) in the manner listed below.

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