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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PRELIMINARY STATEMENT

In *Clancy*, this Court championed the core value of neutrality demanded of attorneys prosecuting public enforcement actions and invalidated the contingent fee "contract of employment" between the City of Corona and attorney James Clancy that gave Mr. Clancy a personal and direct profit interest in the outcome of that public nuisance action. (*People ex rel. Clancy v. Superior Court* (1985) 39 Cal.3d 740, 750 (*Clancy*).) The Court of Appeal in the present case, however, approved just such a contingent fee contract based on a purported factual distinction between *Clancy* and this action: the Court of Appeal concluded that the government plaintiffs here claim to exert control over their outside counsel, while assuming no such control was exercised in *Clancy*. The Court of Appeal's assumption about the record was demonstrably false. But even if it were correct, the critical fact remains that the Court of Appeal has created a loophole that threatens to eviscerate the *Clancy* holding entirely. Such a development is unquestionably one of statewide importance that deserves review by this Court.

The parties' briefing demonstrates a serious dispute over whether the Court of Appeal correctly assumed the plaintiffs here can and will exert a materially different level of control over outside counsel than did the plaintiff in *Clancy*. But, more importantly, the parties' briefing also demonstrates a serious dispute over the policy questions regarding whether a promise to exercise "actual control" over outside counsel can ameliorate the appearance of impropriety

created when attorneys acting in the name of the government, but who stand to profit only if they win the case, litigate questions of public interest, and whether a "control" exception to the *Clancy* rule, even if it were viable in theory, could fairly be implemented in light of the difficulty that opposing parties, trial courts, and the public will face in trying to learn or to know the extent to which control was exercised. In short, the parties dispute whether it is good public policy to retreat from the bright-line rule *Clancy* laid down. That kind of policy determination is one for this Court to make because, in the words of this Court, "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 746.)

ARGUMENT

A. Plaintiffs' Answer To The Petition For Review Confirms That The "Control" Exception Created By The Court Of Appeal Unsettles The Law And Threatens The Neutrality "Essential To The System" Of Justice

The question addressed by this Court in *Clancy* was straightforward: do public nuisance actions fall into that category of cases (such as criminal and eminent domain actions) in which contingent fees are barred? This Court's conclusion was without qualification; public nuisance actions brought by the government fall into that "class of civil actions" in which contingent fee agreements are precluded. (*Clancy*, *supra*, 39 Cal.3d at 748.)

The government entity plaintiffs concede that the kind of "paper control" by government counsel found in the written contracts, here and in *Clancy*, is insufficient to create an exception to the *Clancy* rule. But, the plaintiffs here argue that the government entities plan to

exert "actual control" over the litigation sufficient to make the *Clancy* bar inapplicable. (Answer, p. 3.) This attempt to show that the Court of Appeal's ruling breaks no new ground actually begs a critical public policy question that only this Court can resolve: can the undeniable taint of a direct, private profit motive in an attorney-client relationship between outside counsel and a government entity be washed away by *any* level of purported control from within the government?

An attorney representing the government in an enforcement action undertakes a fiduciary duty to the entire citizenry when stepping in as their counsel, and is charged with deciding not only *how* to prosecute the action, but also *whether* it is truly in the interest of the public as a whole to continue to prosecute the action. (See *Clancy*, *supra*, 39 Cal.3d at 747 [the neutrality requirement for an attorney representing the government "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"].) Can that attorney's personal interest in obtaining the highest monetary recovery possible (even if it benefits only a few citizens at the expense of many) be ignored so long as the attorney is co-counsel of record with an "untainted" government attorney? The Court of Appeal grappled with this policy question only superficially,[1] and this Court should review that analysis and

[1] According to the Court of Appeal, contingent fee counsel are "not *themselves* acting 'in the name of the government'" -- even when they appear for the government at hearings and trial, take and defend depositions, write briefs, answer discovery and review documents for production, and perform any and all other litigation tasks -- if there is at least one other non-contingent fee counsel working for the

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determine whether it can stand in light of the principles expressed in *Clancy*.

Plaintiffs' answer further demonstrates why this Court should grant review when they state that defendants "will have an opportunity to develop a full record if it appears that control is being delegated excessively." (Answer, p. 4 [citing *County of Santa Clara v. Superior Court*, *supra*, 161 Cal.App.4th at 1155 n.11]; see also *id.* at p. 17 [same].) As plaintiffs concede, the "control" contemplated by the Court of Appeal cannot be conclusively established by looking only at the retainer agreement. That concession in turn shows that the "control" exception is unworkable, because it would call into question who actually controls each of the litigation tasks undertaken by contingent fee counsel. Plaintiffs contend that the mere assertion of "actual control" by the non-contingent fee lawyer, untested by discovery, is sufficient to make control "undisputed," "undeniabl[e]," and "conclusively established." (*Id.* at pp. 3, 10, 11.) Yet, such unilateral assertions, which presuppose the potential for *loss* of control to contingent fee attorneys, diminish confidence in the legal system, regardless of how the trial court deals with them.[2]

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government who purports to "control" the litigation. (*County of Santa Clara v. Superior Court* (*Atlantic Richfield Co.*) (2008) 161 Cal.App.4th 1140, 1151-1152.)

[2] The Court of Appeal's theory is apparently that the trial court can review the proceedings while they are ongoing or after they are concluded to determine as a factual matter whether contingent fee counsel was adequately supervised by the government and sufficiently neutral to justify any contingent fee that may have been earned. But no amount of supervision by the government and no amount of *post hoc* review of contingent fee counsel's performance can ever cure the appearance of impropriety that exists from the moment contingent fee counsel become government lawyers. However acceptable the profit

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The government plaintiffs highlight another reason for review: the tension between the foundation for the *Clancy* rule (*i.e.*, the need for neutrality in the prosecution of government interests) and plaintiffs' financial interests in obtaining less costly representation by assigning to outside counsel both some share of the potential spoils and some risk that there will be *no* spoils at the end of the litigation. (See Answer, p. 1 [noting plaintiffs' retention of outside counsel was "[t]o protect the public fisc"].) Assessment of that argument, which goes to fundamental concepts of how governments exercise their powers, is a task for this Court.

In sum, this Court should address whether public confidence in the system of law will erode if those hired to prosecute actions on behalf of the public are paid only if they obtain a monetary verdict. The holding of the Court of Appeal has unsettled this important issue such that it is imperative that this Court grant review now to clarify its prior holding.

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motive inherent in contingent fee engagements may be as a driver of private actions, the government is held to a different standard. Motivating government counsel with contingent fee compensation irrevocably casts doubt on the impartiality and neutrality of the government's case. Nor would an evidentiary *review* assist the government in determining, at the appropriate time, whether "sufficient" control has ceased. Bright-line 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"].)

B. Contrary To Plaintiffs' Assertion, Courts Have Not "Uniformly" Interpreted *Clancy* To Permit A Control Exception

Plaintiffs argue that there is no need for review, because "[i]n the twenty-three years since *Clancy* was decided, the case law interpreting it has been uniform and unremarkable." (Answer, p. 12; see also *id.* at p. 14 ["The majority and concurring opinions below simply add another link to the unbroken chain of post-*Clancy* authorities on this [control] point"].) Even if this were true, it would not constitute a legitimate reason why this Court should not clarify its prior ruling to avoid the due process and ethical problems created by the Court of Appeal's ruling. However, the interpretation of *Clancy* by the courts has not been "uniformly" consistent.

In support of this argument, plaintiffs cite to a few orders prior to the Court of Appeal decision that they assert determined that *Clancy* allows for a control exception. However, other courts have relied upon *Clancy* to preclude contingent fee agreements in public nuisance actions, regardless of the level of "control" purportedly retained by a non-contingent fee attorney. As described in briefing before the Court of Appeal and contrary to plaintiffs' assertions, courts have not "uniformly refused to extend *Clancy* to cover co-counsel arrangements." (Answer, p. 14.)

Just last year, in *People v. Kinder Morgan Energy Partners, L.P.*, No. 07-CV-1883 W (S.D.Cal.), defendants moved to disqualify contingent fee counsel for the City of San Diego (one of the plaintiffs in this case) in a public nuisance action. The contingent fee counsel appeared in the action along with the appointed "in-house" City Attorney. In opposition to the motion to preclude the payment of

contingent fees, the City of San Diego argued that "outside counsel has been hired by a governmental entity to act as co-counsel, with the government's attorneys 'retaining full control over the course of the litigation' and 'actually directing this litigation.'" (January 11, 2008 Letter Brief to Sixth District Court of Appeal in Support of Return by Real Parties in Interest to Petition for Writ of Mandate (January 11, 2008 Letter Brief), Exh. A at p. 10 [Pls.' Mem. Of P. & A. In Opp. To Defs.' Mot. To Disqualify Pls.' Outside Counsel Tatro Tekosky Sadwick LLP, *People v. Kinder Morgan Energy Partners*, No. 07-CV-1883 W (S.D.Cal.)].)

The United States District Court for the Southern District of California granted the motion to disqualify, holding that "[b]ecause the California Supreme Court [in *Clancy*] has declared contingency-fee arrangements improper in public nuisance abatement actions, the Court finds that Outside Counsel cannot continue to represent the City on a contingent-fee basis." (January 11, 2008 Letter Brief, Exh. B at p. 3 [Order Granting Defs.' Mot. to Disqualify Outside Counsel (November 26, 2007), *People v. Kinder Morgan Energy Partners*, No. 07-CV-1883 W (S.D.Cal.)].)[3]

In *People v. Atlantic Richfield Co.*, No. 804030 (Cal.Super.Ct. Orange Cty. July 19, 2002), the District Attorney of Orange County, assisted by outside counsel retained under a contingent fee arrangement, sought to abate an alleged public nuisance arising from

[3] The City of San Diego has filed a petition in the Ninth Circuit Court of Appeals seeking a writ of mandamus to vacate the order by the Southern District, which the Ninth Circuit has not ruled upon. (*In re The City of San Diego* (9th Cir. No. 08-70678) [Petition dated February 6, 2008].)

environmental contamination. The Superior Court determined that the contingent fee arrangement was impermissible under *Clancy* and that the outside lawyer either must be disqualified or must enter into a new fee arrangement based on hourly rates. (Petitioners' Appx., p. 367 [Lawless Decl., Exh. J at p. 2 (July 19, 2002 Order, *People v. Atlantic Richfield Co.*, Cal.Super.Ct. Orange Cty. No. 804030)].) That court reasoned, based on *Clancy*, that even when the government "retains control over the litigation and retains its enforcement discretion," outside attorneys cannot be hired on a contingent fee basis, because they are held to a higher degree of neutrality and those standards cannot be "shed by arranging for a 'neutral watchdog.'" (*Id.* at p. 370 [p. 5].)

These courts, which acted in a manner consistent with *Clancy* by precluding contingent fee agreements in public nuisance actions even when there was purported control by another "neutral" person, stand in marked contrast to the cases cited in plaintiffs' answer. There is no "unbroken chain of post-*Clancy* authorities," but rather, at most, a need for this Court to address the uncertainty created by the Court of Appeal's ruling.

C. Plaintiffs' Reliance On Cases Discussing Other Types Of Biases "Likely" To Prevent A Defendant From Receiving A Fair Trial Is Unavailing

Plaintiffs suggest that review should not be granted in this case, because there has been a "general trend" in California law making it more difficult to "disqualify criminal prosecutors." (Answer, p. 14.) Plaintiffs argue that this "general trend" means that the holding by the Court of Appeal retreating from the *Clancy* rule is not improper. Acceptance of such an argument would only further unsettle the

continued applicability of *Clancy* to contingent fee government prosecutors.

None of the cases cited by plaintiffs involves a contingent fee agreement between the government and outside counsel acting on its behalf. The cases instead involve questions regarding when *other* types of biases (such as personal biases or *indirect* financial motives on the part of a government employee) might require disqualification of a government's attorney. (See *Hambarian v. Superior Court* (2002) 27 Cal.4th 826; *Haraguchi v. Superior Court* (2008) 43 Cal.4th 706; *Hollywood v. Superior Court* (2008) 43 Cal.4th 721; *People v. Superior Court* (*Humberto S.*) (2008) 43 Cal.4th 737.)

There is no dispute that a contingent fee arrangement, which provides an attorney with a direct, personal, substantial pecuniary interest in the outcome of the enforcement action, violates the neutrality standard a prosecutor must meet. As the United States Supreme Court recognized, a prosecutor with a personal stake in the outcome of a case "may be tempted to bring a tenuously supported prosecution if such a course promises financial or legal rewards . . . ." (*Young v. United States ex rel. Vuitton* (1987) 481 U.S. 787, 805.) "Regardless of whether the appointment of private counsel in this case resulted in any prosecutorial impropriety . . . , that appointment illustrates the *potential* for private interest to influence the discharge of public duty." (*Ibid*, emphasis in original.) In short, a court must avoid creating "*opportunities* for conflicts to arise" and must avoid

even "the *appearance* of impropriety." (*Id.* at 806, emphasis in original.)[4]

Plaintiffs' answer to the petition for review confirms that the critical question raised by this action is whether a violation of the neutrality required of attorneys representing the interests of the public at large is washed clean when the contingent fee attorney is supervised by a different, non-contingent fee attorney. (See Answer, p. 17 [observing that the trial court in this case agreed with defendants that "*Clancy* created an absolute rule that categorically barred contingency fee counsel from ever appearing on behalf of a public entity in a public nuisance action, regardless of who exercised control," and adding that "[t]he propriety of this ruling is the *only* question presented" (emphasis in original)].) Put another way, the question is whether the rule remains, as this Court stated in *Clancy*, that the "responsibility *follows the job*," and that an attorney cannot simply shed his or her responsibility to remain neutral so long as someone else in a position of control on the counsel team is neutral. (*Clancy*, *supra*, 39 Cal.3d at p. 747, emphasis added.)

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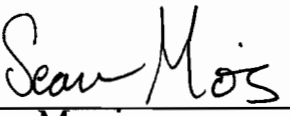
[4] See also *Berger v. United States* (1935) 295 U.S. 78, 88 ["The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; *and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.* As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor -- indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one" (emphasis added).]

CONCLUSION

This Court should grant review to clarify that California law precludes an attorney representing the government in a public nuisance action from being compensated on a contingent fee basis.

Dated: June 19, 2008

Respectfully submitted,



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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 2,850 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: June 19, 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)

PROOF OF SERVICE

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 **June 19, 2008** I served or caused to be served a true copy of the following document(s) in the manner listed below.

REPLY IN SUPPORT OF PETITION FOR REVIEW

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Stacie James

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