Court of Appeal No. H 031540

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

COUNTY OF SANTA CLARA, COUNTY OF SOLANO, COUNTY OF ALAMEDA, COUNTY OF LOS ANGELES, COUNTY OF MONTEREY, COUNTY OF SAN MATEO, CITY AND COUNTY OF SAN FRANCISCO, CITY OF OAKLAND, CITY OF SAN DIEGO, and CITY OF LOS ANGELES,

Petitioners

vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF SANTA CLARA,

Respondent.

ATLANTIC RICHFIELD COMPANY, AMERICAN CYANAMID COMPANY, CONAGRA GROCERY PRODUCTS COMPANY, E.I. DU PONT DE NEMOURS AND COMPANY; NL INDUSTRIES, INC., THE SHERWIN-WILLIAMS COMPANY; ARMSTRONG CONTAINERS, and CYTEC INDUSTRIES, INC.,

Real Parties in Interest.

Santa Clara Superior Court Case No. CV 788657
Honorable Jack Komar

PETITIONERS' REPLY TO REAL PARTIES' RETURN TO PETITION FOR WRIT OF MANDATE, PROHIBITION, CERTIORARI OR OTHER APPROPRIATE RELIEF

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INTRODUCTION

Petitioners are ten California counties and cities who seek to litigate a public nuisance action against the lead companies ("Real Parties" here). The underlying public nuisance action has been pending for seven years. Last year, this Court held that Petitioners had stated a valid public nuisance claim against the lead companies. (*County of Santa Clara v. Atlantic Richfield* (2006) 137 Cal.App.4th 292, 306.) Public entities in several other states have now filed public nuisance cases against these same defendants. In 2006, a Rhode Island jury returned a verdict against the lead companies, finding that they created a public nuisance in that state. That verdict survived all post-judgment motions in the trial court, and is now on appeal. (*See State of Rhode Island v. Lead Industries Association* (2006) 898 A.2d 1234, 1235; *Id.*, Decision Denying Post Trial Motions, Pet. Ex. at 520-718.)

Increasingly vulnerable on the merits of these public nuisance claims, Real Parties have recently taken a different tack. Instead of attacking the merits of the claims, they have attacked the plaintiffs' lawyers. Real Parties have moved to bar public entities from retaining lawyers on a contingency fee basis, filing motions in Rhode Island and Ohio similar to the motion filed here. Real Parties have done so not out of any innate desire to have their counsel face off against other hourly attorneys. They have instead done so because they have calculated, correctly, that their public entity adversaries do not have the means to pursue these complex cases without the assistance of contingency counsel. Real Parties have launched these preemptive strikes in an effort to avoid having to justify their past conduct in a court of law. To date, this effort has failed in Rhode Island and Ohio. It should fail here as well.

Notably absent from Real Parties' Return is any specific description of how Real Parties' legitimate interests will be injured by Petitioners' decision to retain contingent fee counsel to assist them in this case. Real Parties admittedly face no threat of criminal prosecution by biased private counsel, nor is there any threat of pre-hearing deprivation of their property rights. Similarly, Petitioners are not seeking to restrain Real Parties' speech or restrict how they use their property. This case therefore does not require the delicate balancing of competing, fundamental interests that is involved in some public nuisance cases. Even if some balancing were required, it will be done by the neutral public attorneys who have retained control over this case, and who appear here as counsel of record.

Real Parties assert that they may be prejudiced by contingency fee counsel's overzealous conduct. But they identify no such actions to date. Real Parties are essentially asking this Court to assume that Petitioners' private counsel will behave unethically, that Petitioners' public counsel will look the other way, and that the unbiased judiciary will be powerless to offer any protection. California law presumes the exact opposite: that attorneys will behave ethically; that public officials will faithfully discharge their duties; and that judges will exercise appropriate oversight.

Real Parties' speculative arguments simply do not provide a sufficient basis for disqualifying contingency counsel. On the other hand, barring contingency fee counsel from participating in this case will cause a direct and immediate injury to Petitioners, and to the public. Given the enormous complexity of establishing the lead companies' decades-long course of misconduct, Petitioners cannot effectively present their case without the assistance of experienced contingency fee counsel. The trial court's order should be reversed, and this case should proceed on its merits.

ARGUMENT

Petitioners and Real Parties agree that the ruling below was based on an issue of law. This Court therefore reviews the important questions raised by this writ under the *de novo* standard. (Return at 19-20.)

I. CLANCY SHOULD NOT BE EXTENDED TO BAR CONTINGENCY FEE COUNSEL FROM THIS CASE.

Real Parties' argument is based primarily on their expansive interpretation of *People ex rel. Clancy v. Superior Court* (1985) 39 Cal.3d 740. According to Real Parties, *Clancy* establishes a "categorical" and "absolute" rule prohibiting public entities from ever retaining contingency fee counsel in any public nuisance case. (Return at 26, 49.) But the *Clancy* opinion itself suggests possible exceptions to this supposed rule, for example in cases where private counsel assist, but do not replace, public prosecutors. (*Clancy*, 39 Cal.3d at 749 n.3.) Moreover, the abatement action against the book store in *Clancy* gave rise to possible criminal liability for obscenity, raised First Amendment concerns, and involved a government attempt to shut down a potentially legitimate business. None of these factors are present in this case. *Clancy* did not consider -- let alone resolve – whether contingency fee counsel should be disqualified in these circumstances. Accordingly, *Clancy* does not control here.

A. Unlike Clancy, This Case Does Not Involve Possible Criminal Liability Or Prior Restraints On Free Speech.

Clancy involved a concerted effort by the City of Corona to shut down adult book stores by any means available. (Petition, pp. 25-28.) Corona first tried to force the book store in question to move by adopting a zoning ordinance, but the federal courts struck down the ordinance because

it violated the First Amendment. (*Ebel v. City of Corona* (9th Cir. 1983) 698 F.2d 390 [granting preliminary injunction to book store owner]; *Ebel v. City of Corona* (1985) 767 F.2d 635 [granting permanent injunction].) Corona next adopted an ordinance that declared such stores to be public nuisances. At the same time, Corona entered into a contingency fee arrangement with attorney James Clancy, under which Clancy would sue such stores to abate the alleged nuisances. (*Clancy*, supra, at 743.) Clancy was to be paid $30 an hour in unsuccessful cases, but $60 an hour in cases where he prevailed *and* he collected his fees from the defendant book store. *Id.* at 745. Under this fee agreement, Clancy would receive a 100% fee multiplier as a bounty in successful cases, payable not by Corona but by the book store owners.

Thus incentivized, Clancy filed suit against the book store owner who had won the federal case. The Corona police raided her store and photographed 262 allegedly obscene items. Corona next subpoenaed a store clerk to appear in court and produce these items, so that the court could determine whether they were obscene. The clerk, who apparently was the husband of the store owner (*Id.* at 744 & n. 1; compare *Ebel*, *supra*, 698 F.2d at 391), responded to the subpoena by invoking his Fifth Amendment right against self incrimination. As the Clancy opinion notes, the clerk was "potentially subject to criminal prosecution under Penal Code § 311.2, which prohibits the sale of obscene material." *Id.* at 744.

In *Clancy*, the threat of criminal liability against the store clerk was explicit, and the store's owner also was subject to an obscenity charge. Criminal procedures such as the police raid actually had been utilized. In addition, the City of Corona's goal was to shut down book stores selling material that arguably was protected by the book stores' (and the public's)

First Amendment rights. *Clancy* involved the very real possibility that contingency fee counsel, utilizing the apparatus of the criminal justice system, might run the book store defendants out of town -- or at the very least chill their expression of speech protected by the First Amendment. Moreover, given the City's unwavering commitment to shutting down the bookstore, the City might have achieved its goal through sheer harassment, regardless of the merits of the underlying nuisance claim. *Clancy* was based on these unique factors, which are absent here.

In contrast, Real Parties neither assert that they face any criminal liability as a result of this case, nor dispute that the statute of limitations for criminal liability against them has long since run. Moreover, in the seven years that this case has been pending, there has been no hint of any criminal proceedings or criminal liability, no involvement by the police, and nothing to suggest such actions in the future. Real Parties do not argue otherwise.

Instead, Real Parties raise the specter that widespread criminal prosecutions of third-party property owners may follow if Real Parties are held liable for their role in creating the public nuisance. (Return at 35, citing Penal Code § 372.) But Real Parties do not cite to a single instance of a criminal prosecution (as opposed to a civil abatement action) being filed against such a property owner. In addition to being wildly implausible, Real Parties' conjecture does not support their argument for two other reasons. First, Real Parties have no standing to assert the due process rights of third party property owners in hypothetical future criminal proceedings. (*See People v. Badgett* (1995) 10 Cal.4th 330, 344.) Second, contingency fee counsel have no authority to initiate such proceedings, nor to utilize police raids or similar procedures to set them up. Real Parties

simply cannot establish any prejudice to themselves, or even any threat to the due process rights of others, based on such far-fetched hypotheticals.

Real Parties do suggest that their First Amendment rights may be at issue in this case, since their liability may be based in part on statements they made to government officials. (Return at 33, nt. 8.) But the First Amendment does not protect false statements of fact made by a manufacturer in an effort to market its products. (*Kasky v. Nike* (2002) 27 Cal.4th 939, 953.) In any event, Real Parties' tepid assertion of a possible *Noerr-Pennington* defense is at most an effort to avoid liability for statements made years ago. This possible defense does not come close to raising First Amendment issues on par with *Clancy*. In *Clancy*, the California Supreme Court was concerned with Corona's efforts to create a prior restraint on free speech, thereby infringing on the book store's right to sell (and the public's right to buy) protected material. (*Clancy*, 39 Cal. 3d at 749.) In contrast, Petitioners here are not seeking to enjoin Real Parties from engaging in any protected future activities.

Petitioners also are not attempting to enjoin any other aspect of Real Parties' on-going business operations. Similarly, and unlike the book store owner in *Clancy*, there is no possibility that Real Parties will be forced out of business because of the costs associated with responding to this suit. While many public nuisance suits do seek to ban or curtail on-going activities that may have some social utility, Petitioners here seek no such relief. Instead, Petitioners only seek to have Real Parties help abate the public nuisance they helped create. For all of these reasons, the delicate "balancing of interests" required to make the nuisance abatement decision in *Clancy* is not present here. (*Clancy*, 39 Cal.3d at 749.)

Real Parties attempt to turn the crucial distinctions between this case and *Clancy* on their head. Real Parties argue that they are even more deserving of prosecutorial neutrality than the book store owners in *Clancy*, because a large amount of their money is at stake in this case, whereas the issue in *Clancy* was only "whether the adult book stores in one particular city should be shut down." (Return at 36.) But in the constitutional hierarchy, government actions that may create prior restraints on possibly protected speech, and threaten to deprive individuals of their liberty through related criminal prosecution, will and should be subject to greater judicial scrutiny and procedural safeguards than government actions that merely seek to deprive corporations of property based on their past misconduct. (*See e.g.*, *Iraheta v. Superior Court (Garcetti)* (1999) 70 Cal.App.4th 1500, 1509 [finding no right to counsel in civil proceedings unless "an interest that is as fundamental as a right to physical liberty" is a stake]; *Cf. Clancy*, 39 Cal.3d at 745 [noting that corporations cannot claim any privilege against self-incrimination].) This is particularly true since any deprivation of Real Parties' property interests in this case will take place only after Real Parties are accorded all of the due process associated with a trial on the merits in front of an unbiased judge and/or jury.

B. Unlike Clancy, Public Attorneys Retain Control Over Decision Making In This Case.

Clancy is distinguishable for a second and independent reason. The City of Corona retained Clancy to replace its regular City Attorney, rather than to assist him. (*Clancy*, 39 Cal.3d at 744.) The *Clancy* opinion itself is captioned as "The People ex rel. James J. Clancy as City Attorney etc. et al., Petitioners" v. Superior Court. The writ filed by the book store

owners sought to "bar the People from proceeding with Clancy *instead of* the regular City Attorney as its representative . . . ." (*Id.* at 744 [emphasis added].) There is no reference in the opinion to any participation in the case by Corona's regular City Attorney, Dallas Holmes. (*Id.* at 744, 750 n.5.) No public attorney was counsel of record in *Clancy*. (*Id.* at 742.) Instead, Clancy was given unfettered discretion to litigate the case against the book store as he saw fit. The fee arrangement also contemplated that Clancy would bring similar suits against other adult book stores, again without the involvement of any public attorney. (*Id.* at 743, 745, 749 n.4.)

In contrast, numerous County Counsel and City Attorneys are counsel of record in this case. These public attorneys have played an active role throughout this litigation and have controlled it since its inception. (Petition, ¶ 17 at pp. 12-13.) The fee contracts entered into by the Counties and the Cities make clear that these public attorneys will play an active role in the litigation and will control and direct all significant aspects of this case. (Pet. Ex. 7, ¶¶ 1.B-1.C, at pp. 230-231; Ex. 10, ¶ 3.D at pg. 416; Ex. 12 ¶¶ 1.B-1.C, at pp. 434-435.) The scope of the representation set forth in the fee contracts is limited to this litigation. Private counsel are not given any authority to file similar public nuisance cases against other defendants. (Pet. Ex. 12 at pg. 429:11-16; Ex. 14 at pp. 452:6-10; Ex. 18 at pp. 477:18-21.) Unlike in *Clancy*, there has been no excessive delegation of authority to private attorneys to act without the involvement of the public attorneys, who have the ultimate authority to represent the People here.

Real Parties argue that the holding in *Clancy* necessarily must be extended to cases in which contingency counsel assist, but do not replace, public attorneys. But Real Parties fail to take into account the Court's disclaimer in *Clancy* that:

> 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 civil case.

(Clancy, 39 Cal.3d at 748.) *Clancy* does not discuss, and certainly does not answer, the question of whether having public attorneys act as lead counsel in a case would constitute such "appropriate circumstances."

Real Parties claim that *Clancy* implicitly dealt with this issue in a footnote. (Return at 38.) Real Parties read much significance into the *Clancy* court's instruction that, on remand, the case should be brought in the name of the Corona City Attorney (Dallas Holmes), and its suggestion that Corona could "hire Clancy to represent Holmes." (*Clancy*, 39 Cal. 3d at 750, n.5.)[1] Seizing on this suggestion, Real Parties infer that the *Clancy* opinion must have meant to invalidate any fee arrangement that involved Holmes and Clancy as co-counsel, if Clancy was compensated based on a contingent fee. But the Court's suggestion does not address that scenario. Instead, it raises the possibility that an amended complaint could be filed in the name of the City Attorney (Holmes), and that Clancy could be hired "to represent" Holmes, with Holmes playing the role of client rather than co-counsel. There is no indication that Corona requested, or that the *Clancy* court considered, a scenario where Holmes would serve as lead counsel for the People, with Clancy assisting Holmes as co-counsel. The *Clancy* opinion simply does not address whether the presence of a public

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[1] As the *Clancy* court noted in this footnote, public nuisance actions may be brought in the name of the People by, among others, "the City Attorney of any town or city in which such nuisance exists . . . ." (*Id.* at 750, n.5, citing C.C.P. § 731.) A better interpretation of this footnote is that it was improper for the *Clancy* case to have been brought in Clancy's name, since after all Clancy was not the actual Corona City Attorney.

attorney as lead counsel in the case would have permitted Clancy to serve in a subordinate role. Appellate opinions are not authority for propositions they did not consider. (*See e.g., Chevron USA, Inc. v. Workers' Comp. Appeals Bd.* (1999) 19 Cal.4th 1182, 1195.)

Not only did *Clancy* not address a scenario under which a private attorney only assisted (rather than replaced) the public attorney with the authority to bring an action, *Clancy* expressly distinguished such a case. (*Clancy*, 39 Cal.3d at 749 n.3, *distinguishing Sedelbauer v. State* (Ind. App. 1983) 455 N.E. 2d 1159.) In *Sedelbauer*, the State of Indiana brought a criminal prosecution for obscenity against the clerk of an adult book store. A private attorney from "the Citizens for Decency through Law" was allowed to assist the prosecution. (*Id.* at 1164.) Defendant argued that his due process rights were violated by "allowing someone so opposed to pornographic materials to aid in [the] prosecution . . . ." (*Id.*) Despite the obvious potential for overzealous prosecution, the Indiana Court approved the arrangement. It did so because the private prosecutor appeared as co-counsel, rather than "in place of the State's duly authorized counsel." (*Id.*) The *Clancy* opinion distinguished *Sedelbauer* on this basis. (*Clancy*, 39 Cal.3d at 749 n.3.)

Real Parties attempt to dismiss *Sedelbauer* as irrelevant because the private attorney there was not retained on a contingent fee. (Return at 44.) But the core concern in *Sedelbauer* was the degree of neutrality required of a private attorney assisting a public attorney in a criminal case. Consequently, *Sedelbauer* completely undermines Real Parties' argument that absolute neutrality is required for all attorneys who represent the government in criminal prosecutions and public nuisance cases. Allowing a private attorney who was a true believer in the cause of "Decency through

Law" to serve as co-counsel in a criminal obscenity trial is clearly inconsistent with any such requirement. But the court in *Sedelbauer* held that the presence of a neutral public attorney was sufficient to cure any potential for bias. By distinguishing *Sedelbauer*, *Clancy* impliedly recognized the same principle, and at a minimum left this issue open.

II. SUBSEQUENT AUTHORITIES HAVE DISTINGUISHED CLANCY RATHER THAN EXTENDED IT.

In the twenty-two years since *Clancy* was decided, fewer than twenty other published decisions in California have cited it. None applied *Clancy* to disqualify contingency fee counsel who merely assisted public attorneys, or in circumstances even remotely analogous to the facts of this case. In fact, none of these other published cases applied *Clancy* to disqualify *any* contingency fee counsel. This lack of subsequent authority undermines Real Parties' assertion that *Clancy* established a bright line rule barring contingency fee counsel from playing any role in cases such as this one. Courts in other jurisdictions that have considered the issue since *Clancy* have uniformly held that *Clancy* should not be extended to prohibit contingency fee counsel from assisting, rather than replacing, neutral public attorneys. By distinguishing *Clancy*, these cases support the notion that *Clancy* was a highly fact specific ruling. Certainly, they did not adopt the categorical approach requiring disqualification favored by Real Parties.

Real Parties assert that every attorney who represents the government in a suit brought in the government's sovereign capacity must not have a personal interest in the outcome of the litigation. According to Real Parties, the presence (or absence) of neutral public attorneys exerting control over the litigation is simply irrelevant: contingency counsel cannot

play any role in such cases, regardless of who ultimately controls the decision making. But all of the published opinions that have considered this issue since *Clancy* disagree, and hold that control is the key issue.[2]

For example, two courts approved the government's use of contingency fee counsel to assist in the tobacco litigation, precisely because public attorneys retained control over those cases. (*Philip Morris Inc. v. Glendening* (1998) 709 A.2d 1230, 1243; *City and County of San Francisco v. Philip Morris* (1997) 957 F.Supp. 1130, 1135.) Real Parties argue that these cases are distinguishable because they were not public nuisance cases. But Real Parties acknowledge that both opinions "include language implying that the contingency fee agreements also are acceptable because the governmental entities indicated they would retain some degree of control over the activities of private counsel . . . ." (Return at 47.) And although it is true that these two cases were not pled as public nuisance actions, the remedies sought by the governments that brought the tobacco cases were very similar to those available in public nuisance cases. The government plaintiffs in the tobacco cases sought to reform the ongoing activities of an entire industry that were creating grave public health problems, to obtain compensation for past damages, and to force the industry to contribute to the effort to prevent future harm. By contrast, the relief sought in this case is limited to the last of these three categories:

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[2] Real Parties discuss the unpublished opinion of the Orange County Superior Court in *People v. Atlantic Richfield Co.*, No. 804030, which did disqualify contingency fee counsel despite the presence of public attorneys acting as co-counsel. However, this opinion has no precedential value. The case does demonstrate, however, that Atlantic Richfield has been able to successfully employ the same tactic it seeks to use here to derail major environmental clean up litigation.

forcing Real Parties to abate the public nuisance created by their past activities. The tobacco cases thus involved direct governmental efforts to place restrictions and impose liability on otherwise lawful, ongoing business activities, and therefore required a weighing of countervailing interests. This case does not. The conduct that created the nuisance here (the marketing of lead based paint) has long since been banned by law.

Similarly, in the public nuisance action against many of these same Defendants in Rhode Island, the trial court rejected defendants' effort to disqualify contingency fee counsel from representing the State. That court also focused on the key fact that the Rhode Island Attorney General had retained sufficient control over the litigation. (*State of Rhode Island v. Lead Industry Ass'n, Inc.*, 2003 R.I. Super. LEXIS 109, *5-8.) Public attorneys retain control here, and this fact alone provides a sufficient basis for distinguishing *Clancy*.

Most recently, in a ruling handed down after Petitioners filed this writ, United States District Court Judge Edmund Sargus reached this same result in *The Sherwin Williams Co. v. City of Columbus, Ohio* (S.D. Ohio 2007) No. 2:06-cv-00829. Judge Sargus rejected Sherwin-Williams' motion to enjoin several Ohio communities from retaining contingency fee counsel to assist them in bringing public nuisance cases against the lead paint companies. Judge Sargus focused on the "key issue" of whether the cities retained control over the litigation and settlement of the cases. (Petitioners' Request For Judicial Notice ("Pet. RFJN") Ex. 1 [June 19, 2007 hearing transcript] at 84:18-85:2.) With this test in mind, he approved certain of the contingency fee agreements that met "the test as outlined with

regard to control of the litigation and authority to settle . . . ." (Pet. RFJN, Ex. 1 at 87:6-7.)[3]

In addition, Judge Sargus rejected Sherwin Williams' argument that contingency fee counsel must be barred because the public nuisance cases against the lead companies were analogous to criminal prosecutions. Judge Sargus stated:

> I have no difficulty finding this is not what I would call a criminal matter or even quasi criminal. There is no access by the cities to the grand jury. There is no right to the issuance or seeking of search warrants, arrests or seizure orders. There is no chance of incarceration. And the remedies sought are all civil in nature, injunctive relief, abatement or damages. While Ohio law does provide for criminal prosecutions of nuisances, these statutes are not involved in the pending civil cases.

(Pet. RFJN, Ex. 1 at 83:13-20.) Judge Sargus correctly characterized the public entities' suits against the lead companies as suits "in equity to abate nuisances." (Pet. RFJN, Ex. 1 at 16:24.) He therefore held "that this case involves state actions that are much more similar to civil matters rather than criminal in nature." (Pet. RFJN, Ex. 1 at 87:7-9.)

The same is true here. Under California law, this action is also a civil action seeking equitable relief against the lead companies to abate the public nuisance associated with lead paint. (13 *Witkin, Summary of California Law* (10th Ed.), Equity, § 133.) In the seven years this matter has

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[3] Petitioners are submitting herewith a Request For Judicial Notice of the Ohio hearing transcript and the Order denying Sherwin Williams' renewed motion for a preliminary injunction in the Ohio case. Real Parties requested judicial notice of most of the Ohio transcript and this same order as Exhibits F and G to their Request For Judicial Notice ("RP RFJN"). Since Petitioners have objected to Real Parties entire Request For Judicial Notice on procedural grounds, they are submitting these exhibits as part of their own Request For Judicial Notice.

been pending, there has been not a hint of criminal liability or criminal procedures. No under-cover police investigations or raids have taken place, no warrants have been served, no grand jury proceedings are underway. In short, this matter has been and will continue to be litigated under the rules associated with complex civil litigation. These facts also serve to distinguish this case from *Clancy*.

III. REAL PARTIES HAVE NOT ESTABLISHED ANY DUE PROCESS VIOLATION.

In their Return, Real Parties assert that the presence of contingency fee counsel in this case, even in a subordinate role, necessarily violates their due process rights. In fact, Real Parties misclassify *Clancy* as a due process case. The *Clancy* opinion did not characterize the issue presented there as one of due process. Instead, Clancy was disqualified based on the authority of the courts "to disqualify counsel when necessary in the furtherance of justice." (*Clancy*, 39 Cal.3d at 745, citing C.C.P. § 128(a)(5).) One of the cases on which *Clancy* relied made this point more explicitly:

> The principle which the real parties in interest seek to extend is not constitutionally based. Disqualification of a prosecutor for a conflict of interest or appearance of impropriety alone is not a matter of due process but rather an exercise of the court's statutory and inherent power over the processes of trial.

(*People v. Municipal Court for the Santa Monica Judicial District* (1978) 77 Cal.App.3d 294, 299-300, citing C.C.P. § 128; *see also People v. Superior Court (Greer)* (1977) 19 Cal.3d 255, 261 n. 4, 264-265, 268; *People v. Vasquez* (2006) 39 Cal.4th 47, 56-58 [finding no due process violation despite participation of biased prosecutor in murder trial].)

Moreover, Real Parties do not specify any particular way in which the actions of contingency counsel in the litigation to date have been

overzealous or have prejudiced them, nor do they identify any process due them that has not been accorded. Real Parties have not met their burden of establishing a due process violation. To the contrary, Real Parties' liberty is not at stake in this case, and Real Parties will not be deprived of any property interest unless and until they are accorded the full panoply of due process associated with a civil trial in front of an unbiased judge and/or jury. Real Parties' due process claim fails under both federal and state law.

A. Federal Law Does Not Require Government Attorneys To Be Absolutely Neutral, Even In Criminal Prosecutions.

Clancy did discuss a few federal due process cases, and Real Parties attempt to rely on those same cases to support their due process argument. But these federal cases stand for a substantially different proposition: that a *criminal defendant's* due process rights are violated when a *judge or a quasi-judicial officer* will benefit (either directly or indirectly) by finding the defendant guilty or imposing a larger fine. (*Tumey v. Ohio* (1927) 273 U.S. 510, 532 [holding that due process is violated where a *judge* derives income from the defendant's fines]; *Ward v. Village of Monroeville* (1972) 409 U.S. 57, 60 [holding that a town mayor may not serve as a *judge* if fines imposed by the Mayor contribute to local funds subject to the Mayor's control]; *Aetna Life Ins. Co. v. Lavoie* (1986) 475 U.S. 813, 821, 824 [finding due process violation where state supreme court *justice* authored 5-4 opinion that resolved unsettled questions of law in a way that allowed the justice to recover a $30,000 settlement in a pending suit that raised similar issues].)

It is hardly surprising that due process prohibits a judicial or quasi-judicial officer from receiving any benefit contingent on his or her rulings.

However, federal law does not extend this same high standard of neutrality to public attorneys, even in criminal matters, in part because the presence of an unbiased judicial officer serves as a check on the prosecution:

> The rigid requirements of *Tumey* and *Ward*, designed for officials performing judicial or quasi-judicial functions, are not applicable to those acting in a prosecutorial or plaintiff-like capacity. Our legal system has traditionally accorded wide discretion to criminal prosecutors in the enforcement process . . . . Prosecutors need not be entirely 'neutral and detached.' In an adversary system, they are necessarily permitted to be zealous in their enforcement of the law. The constitutional interests in accurate finding of facts and application of law, and in preserving a fair and open process for decision, are not to the same degree implicated if it is the prosecutor, and not the judge, who is offered an incentive for securing civil penalties. The distinction between judicial and nonjudicial officers was explicitly made in *Tumey, 273 U.S., at 535*, where the Court noted that a state legislature "may, and often ought to, stimulate prosecutions for crime by offering to those who shall initiate and carry on such prosecutions rewards for thus acting in the interest of the State and the people."

Marshall v. Jerrico, Inc. (1980) 446 U.S. 238, 248-249 (citations omitted).[4]

This passage from *Marshall* establishes that a criminal defendant's federal due process rights would not be violated if a prosecutor obtained "rewards" for acting on behalf of the State. The presence of an unbiased judiciary serves as a sufficient check against overzealous prosecution in such cases. If this check is sufficient in the case of a criminal defendant

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[4] Real Parties suggest that *Marshall* provides support for their position here. But in *Marshall*, the high court held that it was **not** improper for an assistant regional administrator of the Department of Labor to determine violations of the Fair Labor Standards Act and to assess fines against violators, despite the fact that such penalties are paid to the Employment Standards Administration within the same department. The administrator in *Marshall* arguably performed a quasi-judicial function by determining the amount of the fine which, if not appealed, would become the final assessment. (*Id.* at 244; see also Pet. RFJN, Ex. 1 at 72:5-19.)

whose life or liberty is at stake, it is hard to understand why it would not also be sufficient in this civil case, which involves only the potential post trial deprivation of Real Parties' property interests.

B. California Law Does Not Allow Criminal Prosecutors To Be Recused, Absent A Showing Of Actual Bias That Is Likely To Deprive Defendant Of A Fair Trial.

Real Parties argue that, under *Clancy*, any attorney who assists in the prosecution of an action to abate a public nuisance must be held to the same standards of neutrality as a criminal prosecutor. Real Parties' unspoken premise is that California law applies a rule of absolute neutrality to criminal prosecutors, and that this rule should also apply in public nuisance cases. But this premise is wrong. Like federal law, California law does not require absolute neutrality for prosecutors, even in criminal matters.

Under former law in California, prosecutors in criminal matters were subject to disqualification under an "appearance of conflict" standard, set forth in such case as *People v. Superior Court (Greer)* (1977) 19 Cal.3d 255, 266-267. However, in response to *Greer*, the Legislature adopted Penal Code section 1424 in 1980, in order to apply a more demanding standard to motions to recuse prosecutors. (*People v. Merritt* (1993) 19 Cal.App.4th 1573, 1578.) Under the current standard, a prosecutor may be recused only if "a conflict of interest exists such as would render it unlikely that the defendant would receive a fair trial." (Penal Code § 1424.) To justify recusal under this standard, a two pronged test must be met. First, defendant must demonstrate a "reasonable possibility" that the prosecutor "may not exercise its discretionary function in an even handed manner." (*Hambarian v. Superior Court (the People)* (2002) 27 Cal.4th 826, 833.) Second, "the potential for prejudice to the defendant--the

likelihood that the defendant will not receive a fair trial--must be real, not merely apparent, and must rise to the level of a *likelihood* of unfairness." (*Id.* at 834, *quoting People v. Eubanks* (1996) 14 Cal.4th 580, 592.) As noted in *Eubanks*:

> [S]ection 1424, unlike the *Greer* standard, does not allow disqualification merely because the district attorney's further participation in the prosecution would be unseemly, would *appear* improper, or would tend to reduce public confidence in the impartiality and integrity of the criminal justice system.

(*Eubanks*, 14 Cal.4th at 592.)[5]

The California Supreme Court, applying the standard set forth in section 1424, refused to recuse the district attorney in *Hambarian*, despite the fact that the alleged victim paid a forensic account over $300,000 to become a "full member of the prosecution team." (*Hambarian*, supra, 27 Cal.4th at 839.) In addition, the *Hambarian* opinion expressed no view on whether California law would "permit private counsel for interested parties to prosecute a criminal action 'so long as the Criminal District Attorney retains control and management of the prosecution.'" (*Id.* at 840 n.6, *quoting Powers v. Hauck* (5th Cir. 1968) 399 F.2d 322, 325.)

As *Hambarian* demonstrates, California law simply does not impose a standard of absolute neutrality on criminal prosecutors. It would be odd,

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[5] California is free to set its own rules governing the recusal of judicial officers and prosecutors in criminal cases, subject only to a federal due process floor: "it is normally within the power of the State to regulate procedures under which its laws are carried out . . . and its decision in this regard is not subject to proscription under the Due Process Clause unless it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." (*Aetna Life Ins. Co. v. Lavoie* (1986) 475 U.S. 813, 821, *quoting Patterson v. New York* (1977) 432 U.S. 197, 201-202.)

indeed, if a higher standard of neutrality applied in civil actions to abate public nuisances. One would expect just the opposite: that the standard of prosecutorial neutrality would be at its highest in criminal cases, where a defendant's liberty is directly at stake.

But even assuming that the same neutrality requirements should apply in abatement actions as in criminal prosecutions, Real Parties should not prevail here. They have made no showing that there is a "reasonable possibility" that the public attorneys who retain control of this case "may not exercise [their] discretionary function in an even handed manner." (*Hambarian*, 27 Cal. 4th at 833.) Moreover, Real Parties have not demonstrated any prejudice to their legitimate interests: "the *likelihood* that the defendant will not receive a fair trial." (*Id.* at 834 [emphasis added].) Real Parties are represented by a legion of attorneys from 13 different law firms. (Return at 58-61.) There is simply no possibility, let alone the *likelihood*, that Petitioners and their outside counsel will overwhelm defense counsel and deprive Real Parties of a fair trial. To the contrary, it is the People who will not be able to receive a fair trial in this matter without the continued assistance of outside counsel acting on a contingency fee basis.

C. Under The Flexible Tests Used In Both Federal And State Due Process Cases, There Has Been No Violation Here.

In light of *Marshall*, Real Parties cannot establish that there is any specific rule of federal due process jurisprudence that prohibits attorneys acting on behalf of the government from obtaining rewards for their services. Likewise, no such rule exists as a matter of California due process law. (*People v. Municipal Court (Santa Monica)*, *supra*, 77

Cal.App.3d at 299-300; *People v. Vasquez, supra*, 39 Cal.4th at 56-58.) Under Penal Code section 1424 and *Hambarian*, Real Parties cannot demonstrate that they meet the specific standard under California Law for recusal of the government in a criminal prosecution: that the prosecution has an actual bias that is likely to deprive them of a fair trial. Real Parties also cannot establish a due process violation based on the facts of this case, when analyzed under more general due process case law.

The United States Supreme Court has instructed that due process claims inherently require case-by-case inquiries. Due process requirements are flexible, and must be tailored to the circumstances of a particular situation:

> "'[d]ue process,' unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." "[D]ue process is flexible and calls for *such procedural protections as the particular situation demands*." Accordingly, resolution of the issue whether the administrative procedures provided here are constitutionally sufficient requires analysis of the governmental and private interests that are affected. More precisely, our prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

(*Mathews v. Eldridge* (1976) 424 U.S. 319, 335 [citations omitted, emphasis added].)

In addition to the three factors mentioned in *Mathews*, California due process case law adds a fourth: "the dignitary interest of informing individuals of the nature, grounds and consequences of the action and of

enabling them to present their side of the story before a responsible governmental official . . . ." (*Ryan v. California Interscholastic Federation* (2001) 94 Cal.App.4th 1048, 1071.) Otherwise, the test employed in California "is essentially identical to that employed under the federal analysis." (*Id.*)

Real Parties cannot come close to establishing a due process violation under these four factors. First, the private interest involved is only monetary: Real Parties' interest in avoiding any costs associated with cleaning up the public nuisance they created. Second, the risk of an erroneous deprivation is minimal, since any deprivation will take place only after Real Parties receive all of the process due to them in these judicial proceedings. For this same reason, the probable value, if any, of substitute procedural safeguards is entirely speculative. Third, the interest of the Counties and Cities in remedying the public nuisance created by lead paint is paramount, and the fiscal and administrative burdens of pursuing this case without contingency fee counsel are prohibitive. Fourth and finally, Real Parties dignitary interests have been fully respected and they have been (and will be) provided with ample opportunities "to present their side of the story."

For these same reasons, the Court in *Sherwin-Williams* noted the absence of any risk of a pre-hearing deprivation, and quickly disposed of the identical procedural due process claim:

> The [government entities] have sought injunctive relief and damages but have not sought to seize or restrain any of [Sherwin-Williams'] property or property interests prior to final judgment, if that ever occurs, in state court. If such action occurs and damages are awarded, it will only come after a full trial on the merits in a state court . . . . So I find that with regard to the procedural due process claim, the state law affords [Sherwin-Williams] the greatest possible due process under our law.

(Pet. RFJN, Ex. 1 at 79:22-80:5.)

IV. REAL PARTIES HAVE NOT ESTABLISHED ANY ETHICAL VIOLATION.

Real Parties also suggest that the presence of contingency fee counsel in this case, even in a subordinate role, constitutes a per se violation of ethical rules. Real Parties again do not specify any way in which private counsel have behaved unethically in the case to date. Instead, Real Parties simply assume that contingency fee counsel are motivated solely by self interest, rather than public interest, and that they will disregard any and all ethical rules that stand in the way of maximizing their own recovery. But California law embodies the opposite presumption: courts presume attorneys will behave ethically until confronted with actual evidence to the contrary. This presumption applies to all attorneys, regardless of whether they are acting on an hourly fee basis, on contingency, or pro bono.

Unlike Real Parties, California courts do not presume that attorneys will behave unethically:

> Attorneys are "member[s] of an ancient, honorable and deservingly honored profession." (*People v. Mattson* (1959) 51 Cal.2d 777, 793.) We call them "officers of the court." (*Ibid.*) Let's practice what we preach and treat them with the respect they have earned. As we recently stated in *DCH Health Services Corp. v. Waite* (2002) 95 Cal.App.4th 829, 834, "the court should start with the presumption that, unless proven otherwise, lawyers will behave in an ethical manner."

(*Frazier v. Superior Court* (2002) 97 Cal.App.4th 23, 36.)

For this reason, mere speculation of an unethical conflict of interest, without more, is insufficient to disqualify counsel:

> As distinguished from judicial recusals, which may be required on the basis of a mere "appearance of impropriety" (Cal. Code Jud. Ethics, canon 2; see

> Code Civ. Proc., § 170.1, subd. (a)(6)(C)), *such an appearance of impropriety by itself does not support a lawyer's disqualification.* (*Gregori v. Bank of America* (1989) 207 Cal.App.3d 291, 305-308.) "'Speculative contentions of conflict of interest cannot justify disqualification of counsel.' [Citation.]" (*Smith, Smith & Kring v. Superior Court* (1997) 60 Cal.App.4th 573, 582.)

(*Dch Health Servs. Corp. v. Waite* (2002) 95 Cal.App.4th 829, 833 [emphasis added].

Were the rule otherwise, disqualification would turn on the issue of the "appearance of impropriety" in the eye of the beholder – most often the opposing party. Such a subjective rule would lead to unpredictable results. "The appearance of impropriety ... is a malleable factor having the chameleon-like quality of reflecting the subjective views of the percipient. Judicial decisionmaking should not turn on the psychological or philosophical perceptions of those involved." (*People v. Lopez* (1984) 155 Cal.App.3d 813, 823-824.)

> Despite the many references to the appearances standard in our case law, and despite occasional judicial statements that '[d]isqualification is proper ... to avoid any appearance of impropriety,' there is no California case in which an attorney has been disqualified solely on this basis. Invariably, Canon 9 has been relied upon to disqualify counsel only where the appearance of impropriety arises in connection with a tangible dereliction.

(Addam v. Superior Court (2004) 116 Cal.App.4th 368, 372 [citations omitted].) Because of the robust presumption that attorneys will behave ethically, unsupported assertions by Real Parties and their amici that contingency fee counsel will necessarily behave badly do not provide a basis for disqualification.

In an effort to identify an ethical issue, Real Parties cite to federal cases that bar attorneys who are representing victims in civil litigation from also serving as special prosecutors in related criminal prosecutions. But

these cases involve a "structural" ethical conflict of the attorney representing *two clients* with conflicting goals: the victim, whose goal is to establish guilt at any price for vindication and to increase the civil recovery; and the People, whose interest is in a just outcome to the prosecution.

Young v. United States ex rel. Vuitton (1987) 481 U.S. 787 is instructive in this regard. In *Young*, attorneys representing Louis Vuitton obtained an injunction against a competing business for manufacturing counterfeit Vuitton leather goods. These private attorneys later learned that the *Young* defendants were planning to violate the injunction. They applied to the District Court to be appointed as special counsel to prosecute the *Young* defendants for criminal contempt of the injunction. The Court granted the appointment. The private attorneys, now acting as special counsel for the government, conducted a lengthy undercover sting operation into the counterfeiting ring, during which they made "over 100 audio and video tapes" of meetings and telephone conversations with the defendants. (*Id.* at 792-793.) Defendants were tried and convicted of criminal contempt, and received jail sentences ranging from six months to five years. (*Id.* at 789-790 & n.1.) The United States Attorney's Office was not involved at all in this investigation or prosecution, except for wishing special counsel "good luck" at the outset. (*Id.* at 792.)

The United States Supreme Court overturned the convictions. The Court held that the special counsel's dual role of representing the victim and the government created an irreconcilable conflict of interest:

> where a prosecutor represents an interested party, . . . the ethics of the legal profession *require* that an interest other than the Government's be taken into account. Given this inherent conflict in roles, there is no need to speculate whether the prosecutor will be subject to extraneous influence.

(*Id.* at 807 [emphasis in original]; *see also Ganger v. Peyton* (1967) 379 F.2d 709, 711, 714 [holding that state prosecutor could not try a husband for criminal assault while at the same time representing his wife in a divorce action based on the same conduct, because he was "attempting at once to serve two masters"].)

In a footnote relied on by Real Parties, the *Young* Court then went on to state:

> An arrangement represents an actual conflict of interest if its potential for misconduct is deemed intolerable. The determination whether there is an actual conflict of interest is therefore distinct from the determination whether that conflict resulted in any actual misconduct.
>
> It is true that prosecutors may on occasion be overzealous and become overly committed to obtaining a conviction. That problem, however, is personal, not structural. As the Court of Appeals for the Sixth Circuit said in disapproving the appointment of an interested contempt prosecutor in *Polo Fashions, Inc.* v. *Stock Buyers Int'l, Inc., 760 F.2d 698, 705 (1985),* cert. pending, No. 85-455, such overzealousness "does not have its roots in a conflict of interest. When it manifests itself the courts deal with it on a case-by-case basis as an aberration. This is quite different from approving a practice which would permit the appointment of prosecutors whose undivided loyalty is pledged to a party interested only in a conviction."

(*Young*, 481 U.S. at 807 n. 18.)

Thus the "structural" problem identified by *Young* was the conflicting duties of loyalty one attorney owed two separate clients: the victim and the government. "[S]uch an attorney is required by the very standards of the profession to serve two masters." (*Id.* at 814.) No similar structural problem exists in this case. Private counsel here are not

representing different clients with differing objectives.[6] Rather, Real Parties are arguing that private counsel's own self interest in the outcome of the litigation creates a conflict. But private counsel's ethical duty of loyalty requires them to act at all times in the best interest of their client, rather than in their own best interests. (*Pavicich v. Santucci* (2000) 85 Cal.App.4th 382, 398 [noting attorney-client relationship is "a fiduciary relation of the very highest character"].) Should private counsel nevertheless be overzealous or otherwise disregard their clients' best interests, that would represent a problem that was "personal, not structural." As noted in *Young*, any such problem can be dealt with through the oversight of unbiased judicial officers, acting on a case-by-case basis. The participation of neutral public attorneys in this matter serves as an additional check on any such problem.

The facts of *Young* and *Ganger* raised a second ethical problem: the "danger that the special prosecutor will use the threat of prosecution as a bargaining chip in civil negotiations . . . ." (*Young*, 481 U.S. at 793; *see Ganger*, *supra*, 379 F.2d at 711 [noting evidence that the prosecutor, who also represented the defendant's wife, had "offered to drop the assault charge if Ganger would make a favorable property settlement in the divorce action"].) When a private attorney who is representing a victim in civil litigation is also allowed to prosecute a related criminal case, the full power

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[6] Moreover, the Counties and Cities are not asserting claims for their own past damages. This Court has already ruled that such damages are not available under Petitioners' public nuisance claim. (*County of Santa Clara v. Atlantic Richfield Co.* (2006) 137 Cal.App.4th 292, 309.) So there is no danger that private counsel will be enticed to trade off future abatement relief for greater past damages in an effort to maximize their fee claim.

of the criminal justice system is placed in the private attorney's hands. Such a dual role greatly increases the threat, whether express or implied, that the criminal process will be used to coerce a more favorable civil settlement:

> If a prosecutor uses the expansive prosecutorial powers to gather information for private purposes, the prosecution function has been seriously abused even if, in the process, sufficient evidence is obtained to convict a defendant. Prosecutors "have available a terrible array of coercive methods to obtain information," such as "police investigation and interrogation, warrants, informers and agents whose activities are immunized, authorized wiretapping, civil investigatory demands, [and] enhanced subpoena power." C. Wolfram, Modern Legal Ethics 460 (1986). The misuse of those methods "would unfairly harass citizens, give unfair advantage to [the prosecutor's personal interests], and impair public willingness to accept the legitimate use of those powers." *Ibid.*

(*Young*, supra, 481 U.S. at 811 [plurality opinion].)

California law also recognizes that it is unethical to threaten criminal prosecution in order to secure an advantage in a civil proceeding. Cal. Rules of Prof. Conduct, Rule 5-100. In addition, the "terrible array of coercive methods" available to criminal prosecutors have not been made available to outside counsel here. No threat of criminal prosecution has been made, nor would any such threat be credible. These facts distinguish this case from *Young*, and from *Clancy*.

In the absence of evidence of any actual misconduct, any structural conflict of interest, or any misuse of the criminal process, the Court need not consider the speculative ethical concerns raised by Real Parties and their amici. But these concerns do not withstand scrutiny in any event. These arguments can be broken down into three basic areas: 1) a distaste for contingency fee agreements in general; 2) concern that the prospect of a contingent recovery will lead private counsel to press meritless claims, and

3) concern that the prospect of a contingent recovery will lead to overzealous prosecution or pervert the settlement process.

On the first point, Real Parties and their amici presume that contingency fee counsel are focused only on their own self interest in a recovery, and are unwilling to pursue the larger interests of their clients. This archaic argument presumes that counsel acting on a contingency fee basis will blatantly disregard the duty of loyalty they owe to their clients (*Pavicich*, *supra*, 85 Cal.App.4th at 398), and is an indictment of all contingency fee arrangements.[7] However, California law has long approved of the use of contingency fee agreements, and recognizes them as both necessary and beneficial to promote access to justice. (*Fracasse v. Brent* (1972) 6 Cal.3d 784, 792.)

Real Parties' second concern -- that contingency fee counsel will press meritless claims against them -- fails for at least three reasons. First, Petitioners' claims have merit. This court has already held the Petitioners have stated valid public nuisance claims against Real Parties (*County of Santa Clara v. Atlantic Richfield* (2006) 137 Cal.App.4th 292, 306) and a jury in Rhode Island has returned a verdict against the lead paint companies on similar public nuisance claims. Second, Real Parties' argument presumes that both the public attorneys involved in this case and private

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[7] In this same vein, Real Parties ask this Court to notice a recent Executive Order prohibiting federal agencies from retaining contingency fee counsel. (RP's RFJN, Ex. C.) This Order is irrelevant. It merely demonstrates that the federal government, in an exercise of its discretion, has decided not to retain outside counsel on a contingent basis. The Order would not have been necessary unless the federal government had the power to do so. Petitioners also admittedly have the power to retain contingency fee counsel in appropriate circumstances (Return at 47), and have exercised their discretion to do so here.

counsel will ignore their ethical duties not to present meritless claims. Rule 3-200, Cal. Rules of Prof. Conduct. Third, it would simply make no sense for private counsel, acting on a contingency, to encourage the filing of meritless claims. After all, contingency counsel will not be compensated unless their clients prevail.

Real Parties' third concern – that contingency counsel's profit motive will drive them to maximize recovery regardless of the public interest – is without merit and unsubstantiated. Under the fee contracts entered into in this case, the public attorneys control the decision making, including all decisions about settlement. (Pet. Ex. 7, ¶¶ 1.B-1.C, at pp. 230-231; Ex. 10, ¶ 3.D at pg. 416; Ex. 12 ¶¶ 1.B-1.C, at pp. 434-435.) Even without this express contractual language, as a matter of ethics and agency law the client – and not the attorney -- must make all settlement decisions. (*Blanton v. Womencare* (1985) 38 Cal.3d 396, 404.) If the public entities and public attorneys involved in this case choose, in the public interest, to resolve it for something less than the maximum award that could conceivably be obtained after trial, outside counsel are bound, contractually and ethically, to accept that decision. Unless and until the public entities opt for such a resolution of the case, it is in the public interest to maximize the amount contributed by Real Parties to abate the public nuisance.

Finally, and bearing on the last two concerns expressed above, Real Parties concede that Petitioners are free to hire private counsel on an hourly basis to assist in this litigation. (Return at 53 n. 17.) Even assuming this was financially possible, doing so would not be an ethical panacea. The retention of hourly counsel would simply create different incentives for the private attorneys. While contingency fee counsel will "profit personally from a successful prosecution" of this case (Return at 2), hourly attorneys

would profit personally from a *protracted* prosecution of the case. (See Pet. RFJN, Ex. 1 at 44:19-20 ["in either [hourly or contingent] fee structure, there is hypothetically a conflict of interest built in."].) Indeed, hourly counsel have a much greater incentive to raise nonmeritorious claims and defenses or conduct unnecessary discovery than contingent fee counsel do. Of course, courts presume that hourly counsel will abide by their ethical obligations to their clients, and not needlessly churn files for their own personal gain. Counsel working on a contingent fee basis are entitled to the same presumption of ethical behavior.

Instead of any evidence of unethical behavior in this case, Real Parties and their amici offer only speculation and innuendo. These unsupported assertions are insufficient to show any actual conflict of interest or to support disqualification:

> "'Because conflict rules mainly deal with *risk* of unethical conduct, arguments about these rules often use words like "may," "might," and "could," usually followed by phrases like "be tempted to." Obviously, such words are highly elastic. They tell us nothing about the appropriate tolerance for risk when measured against the social, professional, and monetary costs of disqualification or of forbidding a particular practice arrangement. We allow many arrangements that tolerate some risk because they also provide social or other benefits and because we are prepared to believe that lawyers take their ethical responsibilities seriously. The question, therefore, is not whether a lawyer in a particular circumstance "may" or "might" or "could" be tempted to do something improper, but whether the likelihood of such a transgression, in the eye of the reasonable observer, is of sufficient magnitude that the arrangement or representation ought to be forbidden categorically.'"

(*People v. Christian* (1996) 41 Cal.App.4th 986, 995, n.4, citing *Castro v. Los Angeles County Bd. of Supervisors* (1991) 232 Cal.App.3d 1432, 1444.)

In sum, Real Parties' unsupported claims regarding supposed threats of unethical conduct must be rejected. The presumption here must be that contingency counsel are acting ethically and in the public interest to abate a nuisance that harms thousands of children each year, and that the public attorneys who are in control of this case are also faithfully discharging their duties.

This presumption provides a complete answer to Real Parties' argument that the contingency fee arrangement here must be categorically rejected, or else the court will be drawn into an unseemly inquiry into how much influence outside counsel really are exerting over this case. No such inquiry is necessary. Instead, courts should take the public attorneys and their outside counsel at their word, especially since control is expressly reserved to the public attorneys under their fee contracts. This is precisely the approach taken by the other courts who have considered this issue. None of those courts engaged in a factual inquiry into the degree of control. Instead, they restricted their inquiry to the express terms of the fee contract. (*See, e.g.*, *Philip Morris Inc. v. Glendening* (1998) 709 A.2d 1230, 1243 [citing to contract that provided that the attorney general "'shall have the authority to control all aspects of [outside counsel's] handling of the litigation'"].) In some instances, courts have invalidated contractual provisions which purported to delegate to private counsel the authority of public attorneys to control a case (*State of Rhode Island v. Lead Industry Ass'n, Inc.*, 2003 R.I. Super. LEXIS 109, *5-8), or gave private attorneys a veto over the settlement of a case. (Pet.'s RFJN, Ex. 2, *The Sherwin Williams Co. v. City of Columbus, Ohio*, order denying renewed motion for preliminary injunction, [discussing problematic contractual provisions].) But courts have never engaged in (or allowed opposing counsel to engage

in) the type of fishing expedition into the issue of control suggested by Real Parties. Absent concrete evidence of unethical behavior, there is no basis for such an inquiry.

V. THE BALANCE OF INTERESTS IN THIS CASE TIPS DECISIVELY IN FAVOR OF ALLOWING THE PEOPLE TO BE ASSISTED BY CONTINGENCY FEE COUNSEL.

Since Real Parties cannot demonstrate any due process violation or ethical infraction, the standard for deciding whether to disqualify contingency counsel from further proceedings here should be the same as in *Clancy*: whether, given the circumstances of this case, it is "necessary in the furtherance of justice" to disqualify private counsel. (*Clancy*, 39 Cal.3d at 745.)

Applying this standard necessarily involves a weighing of competing interests. An example of such balancing took place in *People v. Municipal Court*, *supra*, 77 Cal.App.3d 294. That case arose out of a criminal prosecution for battery on a police officer. The criminal defendants moved to disqualify the Santa Monica City Attorney, who was prosecuting the criminal case, on the grounds that the City Attorney was also defending Santa Monica and its police officers in a civil excessive force claim arising out of the same incident. (*Id.* at 297-298.) According to the criminal defendants, this dual role improperly biased the city attorney in the criminal prosecution. The trial court granted the motion. The Court of Appeal considered the disqualification "in light of the benefit that will result from it and its potential for harm." (*Id.* at 300.) Concluding that the "dislocation and increased expense of government is not justified by the speculative and minimal benefit to be obtained" through disqualification, the Court of

Appeal issued a writ and reinstated the City Attorney as criminal prosecutor. (*Id.* at 301.)

This case likewise involves the weighing of competing interests. The interest to be considered on the Petitioners' side of the balance include: Petitioners "right to chosen counsel, [private attorney's] interest in representing [Petitioners], the financial burden on [Petitioners] to replace disqualified counsel, and the possibility that tactical abuse underlies the disqualification motion." (*People v. SpeeDee Oil Change Systems, Inc.* (1999) 20 Cal.4th 1135, 1145.) On the other side of the balance rests Real Parties' asserted interest in not being prejudiced by the participation of contingency counsel in this case. A consideration of these competing interests demonstrates that the balance overwhelmingly favors Petitioners.[8]

A. The Counties And Cities Have Compelling Interests In Retaining Contingency Fee Counsel To Assist Them.

The Counties and Cities have brought this action in order to address an ongoing public health threat that plagues their jurisdictions. The continuing, widespread presence of lead paint causes continual injuries to the public, and especially to young children. California's Counties and Cities are on the front lines of the effort to combat this continuing nuisance,

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[8] Courts are mindful of the fact that "motions to disqualify counsel are especially prone to tactical abuse because disqualification imposes heavy burdens on both the clients and courts: clients are deprived of their chosen counsel, litigation costs inevitably increase and delays inevitably occur. As a result, these motions must be examined 'carefully to ensure that literalism does not deny the parties substantial justice.'" (*City of Santa Barbara v. Superior Court* (2004) 122 Cal.App.4th 17, 23, *quoting People v. SpeeDee Oil Change, supra*, 20 Cal.4th at 1144.)

and are the medical and service providers of last resort for many of those who have been (and will continue to be) injured by lead paint.

The Counties and Cities that brought this case, along with their duly appointed or elected County Counsel and City Attorneys, have made legislative and executive judgments that bringing this action is in the public interest. They have also made legislative and executive judgments that they must retain private counsel, acting on a contingency fee basis, to have any realistic opportunity for success in this matter. Without such assistance, the Counties and Cities lack the resources to match up against Real Parties and their counsel.

For the past seven years, private counsel have provided crucial assistance to Petitioners in two respects. First, they have advanced the large amount of attorney time and out-of-pocket expenses necessarily involved in litigating this type of case. This commitment has included, and will continue to include, the time and expenses associated with very extensive discovery and the development of expert testimony on numerous topics, including the history of industry knowledge, the history of medical knowledge, the toxicity of lead, the association of lead paint with childhood lead poisoning, and effective measures to prevent exposure. Second, private counsel have provided special expertise in litigating this matter against the lead paint defendants. Private counsel are very experienced in complex civil litigation, and have been litigating cases raising similar issues for many years (as have defense counsel). It simply makes no sense for Petitioners to attempt to replicate this expertise in house, nor can they afford to pay for it on an hourly basis.

Real Parties claim that it is inconsistent for Petitioners to argue that they need the assistance of outside counsel to litigate this matter, while at

the same time arguing that public attorneys will retain control over the case. (Return at 43.) But there is no inconsistency. Committing the resources needed to control a case, as Petitioners have done, requires a much lower outlay of public resources than would be required to litigate all aspects of this case on an hourly or in-house basis.

Real Parties also assert that since Petitioners are large public entities, they necessarily must have ample resources to hire as many hourly attorneys as necessary to bring this case to trial. (Return at 50-51.) The short answer to this assertion is that it is for the Counties and the Cities, rather than Real Parties or even the courts, to determine how best to utilize their scarce local resources. Moreover, Real Parties are out of touch with the realities of local government finance in California.

In an attempt to support their assertion, Real Parties request judicial notice of certain proffered facts concerning the size of Petitioners' budgets and the number of attorneys they employ. In addition to being improper,[9] Real Parties' request for judicial notice is beside the point. The absolute sizes of Petitioners' respective budgets are irrelevant, unless considered in relation to the enormous financial burdens that have increasingly fallen on California local governments after the passage of Propositions 13 and 218. While Real Parties may ignore these realities, the courts have not. (*See, e.g., Wells v. One2One Learning Foundation* (2006) 39 Cal.4th 1164, 1193-1195 [discussing "the stringent revenue, appropriations, and budget restraints under which all California government entities operate . . . ."].)

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[9] On August 14, 2007, Petitioners filed an objection to Real Parties RFJN for procedural, evidentiary and substantive grounds. Petitioners incorporate those objections herein by reference.

California Courts recognize the significant interest that all parties have in being represented by counsel of their choice. (*See e.g., City of Santa Barbara, supra*, 122 Cal.App.4th at 23.) But in this case, an even greater interest is involved. Without the continued assistance of private attorneys acting on a contingency fee basis, the Counties and Cities will be deprived of any meaningful opportunity to present the merits of their case. One of the main benefits of contingency fee contracts is to somewhat equalize the imbalance in resources between litigants, so that claims can be presented and resolved on their merits. Contingency fee arrangement thus further "the important public policy of ensuring that civil disputes are resolved on their merits" rather than by tactical maneuvers or on procedural grounds. (*Rapp v. Golden Eagle Ins. Co.* (1994) 24 Cal.App.4th 1167, 1173.) That public policy should be at its strongest in a case such as this one, brought by government entities to protect the health of their citizens.

B. Real Parties Have No Legitimate Interest In Dictating The Terms Under Which Petitioners Retain Private Counsel

The interests of the Counties and Cities in being represented by private counsel on a contingency fee basis are both immediate and compelling. In contrast, Real Parties have failed to demonstrate any substantial prejudice that they will suffer as a result of contingency fee counsel's participation in this case. Private counsel have assisted the public attorneys in this case for seven years now, and Real Parties do not point to one act during this time that demonstrates bias or actual prejudice.

The only immediate interest of Real Parties is in derailing this litigation by eliminating Petitioners' outside counsel, to avoid answering on the merits public nuisance claims that this Court has already held are well

pled. (*County of Santa Clara v. Atlantic Richfield* (2006) 137 Cal.App.4th 292, 306.) But that is not an interest that has any legitimacy, regardless of whether the issue is analyzed as a question of due process, ethics, or of the inherent power of the courts to regulate attorneys as necessary in the furtherance of justice. If the Counties and Cities had the resources to hire an army of hourly attorneys, as Real Parties suggest that they should, there is no reason to expect that this case would be litigated any less zealously. Real Parties are not entitled to under zealous government enforcement due to lack of resources. (*People v. Parmar* (2001) 86 Cal.App.4th 781, 800.)

The legitimate interests of Real Parties in the disqualification of contingency fee counsel in this case, if any, are remote, speculative, and insubstantial. Real Parties suggest that they will be subject to overzealous prosecution due to the incentive that contingency fee counsel have to prevail in this matter. A number of checks exist against any such problems, including: the private attorneys' ethical duties to act in the best interests of their clients, rather than themselves; the public attorneys' power to control this litigation, and the power of the courts to prevent any overreaching. In light of these safeguards, any injury to Real Parties' legitimate interests is entirely speculative.

Real Parties engaged in a decades-long course of conduct that has created a wide-spread public nuisance throughout California. Theoretically, they could be called to account for their conduct in a number of different civil suits, including being named as defendants in class actions or in public nuisances suits brought by private parties who have been specially injured by the nuisance. (See 13 *Witkin, Summary of California Law* (10th Ed.), Equity, § 133 [noting that a "public nuisance may be abated . . . by civil actions brought by private persons who are specially injured."].)

The plaintiffs in such suits would almost certainly be represented by private counsel engaged on a contingency fee basis. Real Parties suffer no more prejudice responding to this suit than they would responding to such private suits. As a matter of public policy, it makes no sense to deprive only public entity plaintiffs of the ability to utilize contingency fee counsel to bring such cases.

Finally, Real Parties are exposed to no risk of any pre-hearing deprivation. Unlike criminal prosecutors wielding "a terrible array of coercive methods," neither the public attorneys nor their outside counsel here have the ability to use the machinery of the criminal justice system to cause any immediate injury to Real Parties. Before Real Parties are deprived of any property, the Counties and Cities will have to prove up their case in a civil trial in front of an unbiased judge and/or jury. This process serves as the ultimate check on any allegedly overzealous tactics. After all, in the adversarial system, "the basic guardians of the defendant's rights at trial are his attorneys and the court, not the prosecutor." (*People v. Vasquez* (2006) 39 Cal.4th 47, 69.)

CONCLUSION

Real Parties' assertion that *Clancy* adopted an ironclad and absolute rule encompassing all conceivable contingency fee arrangements in all conceivable public nuisance cases is simply not supported by *Clancy* itself, or by any subsequent precedent. Real Parties have not established that, under the circumstances of this case, the participation of contingency fee counsel will create any due process violation, any ethical conflict, or any substantial prejudice to Real Parties. On the other hand, depriving the Counties and Cities of their counsel of choice will deprive them of any meaningful opportunity to present their claims on the merits.

For these reasons, Petitioners respectfully request that this Court issue a writ of mandate or prohibition directing the Superior Court to reverse its order and enter a new order denying Real Parties' motion to bar contingency fee counsel from this case.

Dated: August 20, 2007

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief has been prepared using proportionately double-spaced 13 point Times New Roman typeface. According to the "Word Count" feature in my Microsoft Word for Windows software, this brief contains 11,910 words up to and including the signature lines that follow the brief's conclusion.

I declare under penalty of perjury that this Certificate of Compliance is true and correct and that this declaration was executed on August 20, 2007.

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IN THE COURT OF APPEAL FOR THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

PROOF OF SERVICE BY MAIL

County of Santa Clara v. Atlantic Richfield Company, et al. Case No. H 031540

I, Cassaundra M. Foster, say:

I am now and at all times herein mentioned have been over the age of eighteen years, employed in Santa Clara County, California, and not a party to the within action or cause; that my business address is 70 West Hedding, East Wing, 9th Floor, San Jose, California 95110-1770. I am readily familiar with the County's business practice for collection and processing of correspondence for mailing with the United States Postal Service. I served a copy of **PETITIONERS' REPLY TO REAL PARTIES' RETURN TO PETITION FOR WRIT OF MANDATE, PROHIBITION, CERTIORARI OR OTHER APPROPRIATE RELIEF**, by placing said copy in an envelope addressed to:

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on **August 20, 2007**, at San Jose, California.

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84526.wpd

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