S_____

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

MOTION FOR JUDICIAL NOTICE BY REAL PARTIES IN INTEREST; DECLARATION OF SEAN MORRIS IN SUPPORT THEREOF

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* To seek admission *pro hac vice*

TABLE OF AUTHORITIES

Defendants/Real Parties in Interest hereby submit this motion to request that the Court take judicial notice, pursuant to Rule of Court 8.252(a)(1) and Evidence Code section 459 and other provisions specified below, of the documents contained in Exhibits A-F, attached hereto, which are filed in support of the Petition for Review.

These documents consist of excerpts of the record before this Court in *People ex rel. Clancy v. Superior Court* (1985) 39 Cal.3d 740 (*Clancy*) and the Court's initial opinion in that action. These documents were previously submitted to the Sixth District Court of Appeal by Real Parties in Interest in a Motion Requesting [the Sixth District] to Consider Petition for Rehearing, filed on April 28, 2008. The Court of Appeal denied the motion on April 30, 2008. The relevant portions of the *Clancy* record (which are filed concurrently as attached to the Morris Declaration) are not voluminous in size, yet clearly shed light on a critical factor relied upon by the Court of Appeal in its Order issued April 8, 2008.

Under the principles expressed in *Clancy*, it is improper for a representative of the government to have a personal financial stake in the outcome of a public nuisance action in the form of a contingent fee agreement. The Court of Appeal held that the rule articulated in *Clancy* is limited to the facts at issue in that case and that attorneys representing the government in public nuisance cases can be retained on a contingent fee basis if they "are merely assisting in-house counsel and lack any control over the litigation." (Opinion, p. 12.)

However, that holding is based in part on an incorrect understanding of the facts in *Clancy* and the issues raised there, as demonstrated by the attached documents. Among other things, these

documents show that the contingent fee agreement at issue in *Clancy* contained the substantively identical "control" provision -- *i.e.*, stating that control over the litigation remained with the government and its "in-house" counsel -- as contained within the agreements in this case. This "control" provision was expressly brought to this Court's attention in *Clancy* and argued by the contingent fee counsel there. Nevertheless, this Court held that the contingent fee agreement was improper.

As the Court of Appeal noted in its Opinion, "In every case, it is necessary to read the language of an opinion *in the light of its facts and the issues raised*, in order to determine which statements of law were necessary to the decision, and therefore binding precedent, and which were general observations unnecessary to the decision." (*Fireman's Fund Ins. Co. v. Maryland Cas. Co.* (1998) 65 Cal.App.4th 1279, 1300-01, emphasis added [in reviewing Supreme Court precedent, appellate court considered whether the Court had been "presented with a record" that required a particular understanding of the holding].) The attached documents provide insight as to the "facts and issues raised" in *Clancy*.

Below is a description of the documents for which Real Parties in Interest request that the Court take judicial notice.

1. Excerpts of Petition for Writ of Mandate with Supporting Memorandum of Points and Authorities and Exhibits, *State of California v. Superior Court*, Case No. E-000934 (Cal.Ct.App., May 1, 1984), a true and correct copy of which is attached hereto as Exhibit A. Judicial notice is proper pursuant to Evidence Code section 452(d)(1) (judicial notice is proper of the "[r]ecords of (1) any court of this state").

2. Opinion, *People ex. rel. Clancy v. Superior Court*, Case No. L.A. 32041, 85 Daily Journal D.A.R. 3223 (Cal., Sept. 16, 1985), a true and correct copy of which is attached hereto as Exhibit B. This is a copy of this Court's initial opinion in *Clancy* prior to the Petition for Rehearing, as published in the *Daily Journal* legal newspaper. Judicial notice is proper pursuant to Evidence Code sections 452(a), (c), and (h).

3. Excerpts of Petition for Rehearing, *People ex. rel. Clancy v. Superior Court*, Case No. L.A. 32041 (Cal., Oct. 1, 1985), a true and correct copy of which is attached hereto as Exhibit C. Judicial notice is proper pursuant to Evidence Code section 452(d)(1).

4. Order Denying Rehearing, *People ex. rel. Clancy v. Superior Court*, Case No. L.A. 32041 (Cal., Nov. 20, 1985), a true and correct copy of which is attached hereto as Exhibit D. Judicial notice is proper pursuant to Evidence Code section 452(d)(1).

5. Excerpts of Petition for Hearing by Real Parties in Interest After Decision by Court of Appeal Granting Writ of Mandate, *People ex. rel. Clancy v. Superior Court*, Case No. L.A. 32041 (Cal., Dec. 26, 1984), a true and correct copy of which is attached hereto as Exhibit E. Judicial notice is proper pursuant to Evidence Code section 452(d)(1).

6. Excerpts of Additional Authorities Not Contained in the Papers and Briefs on File, *People ex. rel. Clancy v. Superior Court*, Case No. L.A. 32041 (Cal., Dec. 26, 1984), a true and correct copy of which is attached hereto as Exhibit F. Judicial notice is proper pursuant to Evidence Code section 452(d)(1).

Real Parties In Interest accordingly respectfully request that the Court take judicial notice of the attached materials.

Dated: May 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 motion, excluding tables and attachments, consists of 855 words as counted by the Microsoft Word word-processing program used to generate this petition. The brief was typed using Times New Roman proportionally spaced font in 14-point typeface.

Dated: May 19, 2008

Sean Morris

DECLARATION OF SEAN MORRIS

I, SEAN MORRIS, declare:

1. I am a member of the bar of this Court and a partner of Arnold & Porter LLP, attorneys for defendant Atlantic Richfield Company in this action. I submit this declaration in support of the motion for judicial notice filed in connection with defendants' Petition for Review. I have personal knowledge of the facts set forth herein.

2. Under my direction, Arnold & Porter obtained, through a court service company, copies of briefs and other portions of the record in the California Supreme Court from the *People ex rel. Clancy v. Superior Court*, 39 Cal. 3d 740 (1985) (*Clancy*), action.

3. At my request, Arnold & Porter also obtained, from the Los Angeles Law Library Document Delivery Service, a copy of the initial opinion issued by the Supreme Court in the *Clancy* action that appeared in the Daily Journal Appellate Report.

4. Attached hereto as Exhibit A is a true and correct copy of excerpts of the Petition for Writ of Mandate with Supporting Memorandum of Points and Authorities and Exhibits, *State of California v. Superior Court*, Case No. E-000934, dated May 1, 1984, which was obtained from the Supreme Court's archives.

5. Attached hereto as Exhibit B is a true and correct copy of the initial opinion in *People ex rel. Clancy v. Superior Court*, Case No. L.A. 32041, 85 Daily Journal D.A.R. 3223 (Cal., Sept. 16, 1985).

6. Attached hereto as Exhibit C is a true and correct copy of excerpts of Petition for Rehearing, *People ex rel. Clancy v. Superior Court*, Case No. L.A. 32041 (Cal., Oct. 1, 1985), which was obtained from the Supreme Court's archives.

7. Attached hereto as Exhibit D is a true and correct copy of the Order Denying Rehearing, *People ex rel. Clancy v. Superior Court*, Case No. L.A. 32041 (Cal., Nov. 20, 1985), which was obtained from the Supreme Court's archives.

8. Attached hereto as Exhibit E is a true and correct copy of excerpts of Petition for Hearing by Real Parties in Interest After Decision by Court of Appeal Granting Writ of Mandate, *People ex rel. Clancy v. Superior Court*, Case No. L.A. 32041 (Cal., Dec. 26, 1984), which was obtained from the Supreme Court's archives.

9. Attached hereto as Exhibit F is a true and correct copy of excerpts of Additional Authorities Not Contained in the Papers and Briefs on File, *People ex rel. Clancy v. Superior Court*, Case No. L.A.

32041 (Cal., Dec. 26, 1984), which was obtained from the Supreme Court's archives.

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 this 19th day of May 2008 in Los Angeles, California.

Sean Morris

EXHIBIT A

4th Civil No. _____

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION 2

PEOPLE OF THE STATE OF CALIFORNIA, on relation of the CITY ATTORNEY OF CORONA, CALIFORNIA; CITY OF CORONA, a municipal corporation, Petitioners, v. SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF RIVERSIDE, Respondent, THE "BOOK STORE", being a bookstore and motion picture arcade, located at 601 West Sixth Street, Corona, County of Riverside, California; HELEN E. EBEL; THOMAS CHARLES EBEL; EUGENE VAN ZEE; DOES 1 through 10, inclusive, Real Parties in Interest.	4th Civil No. _____ (Riverside County Superior Court No. 160755)

PETITION FOR WRIT OF MANDATE
WITH SUPPORTING
MEMORANDUM OF POINTS AND AUTHORITIES

(THE HONORABLE J. DAVID HENNIGAN, JUDGE PRESIDING)

4th Civil No. _____

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION 2

PEOPLE OF THE STATE OF CALIFORNIA, on relation of the CITY ATTORNEY OF CORONA, CALIFORNIA; CITY OF CORONA, a municipal corporation, Petitioners, v. SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF RIVERSIDE, Respondent, THE "BOOK STORE", being a bookstore and motion picture arcade, located at 601 West Sixth Street, Corona, County of Riverside, California; HELEN E. EBEL; THOMAS CHARLES EBEL; EUGENE VAN ZEE; DOES 1 through 10, inclusive, Real Parties in Interest.	4th Civil No. _____ (Riverside County Superior Court No. 160755)

PETITION FOR WRIT OF MANDATE
WITH SUPPORTING
MEMORANDUM OF POINTS AND AUTHORITIES

(THE HONORABLE J. DAVID HENNIGAN, JUDGE PRESIDING)

To the Honorable Margaret G. Morris, Presiding Justice and to the Honorable Associate Justices Marcus M. Kaufman, F. Douglas McDaniel and Robert E. Rickles of the California Court of Appeal, Fourth Appellate District, Division Two:

Petitioners People of the State of California on the relation of the City Attorney of Corona, California and City of Corona, a

municipal corporation, by this verified Petition for Writ of Mandate, pursuant to Code of Civil Procedure § 1085, seek a Writ of Mandate to require the Respondent Superior Court of the State of California for the County of Riverside, the Honorable J. David Hennigan, Judge Presiding, to annul and vacate its protective order issued from the bench on April 20, 1984 which granted partial relief from the subpoena duces tecum which Petitioners served on Timothy Groover. Said subpoena duces tecum was served on Mr. Groover as the person in charge of the "Book Store" on February 22, 1984 and required him to appear at the hearing on Plaintiffs' motion for a preliminary injunction and bring with him the magazines which were identified by title in the subpoena duces tecum and alleged to be in his possession or under his control at the time of service of the subpoena. Respondent Courts' order from the bench on April 20, 1984, required Mr. Groover to appear in Court on May 11, 1984 in response to the subpoena portion of the subpoena duces tecum but also ruled that he need not bring with him the magazines which were identified by title in the subpoena duces tecum, unless Plaintiffs procured a grant of immunity for him.

Plaintiffs further request an order of this Court requiring Real Party in Interest, Helen E. Ebel, as the sole owner and operator of the "Book Store" and employer of Timothy Groover, to produce at the hearing on Plaintiffs' motion for a preliminary injunction on May 11, 1984, one copy of each of the magazines which were identified by title in the subpoena duces tecum which was served on her employee, Timothy Groover, on February 22, 1984.

Petitioners allege as follows:

1. Petitioners are the Plaintiffs in the First Amended Supplemental Complaint for Abatement of Public Nuisances, Declaratory Judgments, Injunctions, now pending before the Superior Court of the State of California for the County of Riverside, entitled, People of the State of California on the Relation of the City Attorney of Corona, California; City of Corona, a Municipal Corporation, v. The "Book Store", being a bookstore and motion picture arcade, located at 601 West Sixth Street, Corona, County of Riverside, California; Helen E. Ebel; Thomas Charles Ebel; Eugene Van Zee; Does 1 through 10, inclusive, case No. 160755. A true and correct copy of the First Amended and Supplemental Complaint for Abatement of Public Nuisances, Declaratory Judgments, Injunctions, as amended by order of the Court on April 20, 1984, is attached as Exhibit 1 to this Petition and pleaded by incorporation, as though set forth herein in full.

2. On February 21, 1984, Petitioners noticed two motions; one, a motion for a hearing on a preliminary injunction, and the other, a motion to advance the hearing on the final injunction and to consolidate the same with the hearing on the preliminary injunction, and set both motions for a hearing at 8:30 a.m. on March 9, 1984 in Department 1. Said hearing has been continued from time to time by agreement of the parties and is now set for 8:30 a.m. on May 11, 1984 in Department 1.

3. On January 16, 1984, ten (10) days after filing of the original complaint, Corona Police Lieutenant Larry Thayer and Detective Les Scott visited the "Book Store" for the purpose of conducting a photographic surveillance of the subject matter possessed for sale in the "retail" section of the "Book Store" and

was served on Clerk Timothy Groover and the Defendants' motion for a protective order as to Timothy Groover and his duty to respond to the subpoena duces tecum should be denied. See United States v. Doe, ___ U.S. ___, 79 L.Ed.2d 552 at 559, citing Fisher v. United States, 425 U.S. 391 at 409-410, 48 L.Ed.2d 39, for the proposition that:

> "The taxpayer cannot avoid compliance with the subpoena merely by asserting that the item of evidence which he is required to produce contains incriminating writing, whether his own or that of someone else."

and compare footnote 13 of U.S. v. Doe, supra, at page 561 and footnotes 17 and 18 on page 563.

Accordingly, a writ of mandate should issue commanding Respondent Court to vacate and annul that part of its protective order of April 20, 1984 which ordered that Timothy Groover need not bring the subpoenaed magazines to Court unless Plaintiff procures a grant of immunity for him. Further, this Court should issue its order directing the Real Party in Interest, Helen E. Ebel, as the sole owner and operator of the "Book Store" and employer of Timothy Groover, to produce at the hearing of Petitioners' Motion for a Preliminary Injunction on May 11, 1984, one copy of each of the 262 magazines identified by title in the subpoena duces tecum which was served on Timothy Groover, her employee.

DATED: May 1, 1984

Respectfully submitted,

JAMES J. CLANCY
Attorney for Petitioners.

0005

EXHIBIT 1

First Amended and Supplemental Complaint for Abatement of Public Nuisances, Declaratory Judgments; Injunctions, as amended.

(Reference: Petition at page 3, lines 1-15)

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City of Corona, California

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF RIVERSIDE

PEOPLE OF THE STATE OF CALIFORNIA ~~ex rel. JAMES J. CLANCY, as Special Attorney for the City of Corona, California~~, ON THE RELATION OF THE CITY ATTORNEY OF CORONA, CALIFORNIA; CITY OF CORONA, a Municipal Corporation, Plaintiffs, v. THE "BOOK STORE," BEING A BOOKSTORE AND MOTION PICTURE ARCADE, located at 601 West Sixth Street, Corona, County of Riverside, California; HELEN E. EBEL; THOMAS CHARLES EBEL; EUGENE VAN ZEE; Does 1 through 10, inclusive, Defendants.	CASE NO. 160755 FIRST AMENDED AND SUPPLEMENTAL COMPLAINT FOR ABATEMENT OF PUBLIC NUISANCES, DECLARATORY JUDGMENTS; INJUNCTIONS, AS AMENDED

NOW COME the People of the State of California ~~ex~~ on the relation of the City Attorney of Corona, California ~~rel. James J. Clancy, as Special Attorney for the City of Corona~~, joined by the City of Corona and, for their complaint against the defendants herein, complain and allege as follows:

ALLEGATIONS COMMON TO ALL CAUSES OF ACTION

1. Plaintiff ~~JAMES J. CLANCY is now and at all~~ City Attorney of the City of Corona is

Riverside County ~~times mentioned herein was the Special Attorney for the City of Corona in Riverside County and~~ brings this action at the direction of the City Council of the City of Corona and as relator for the People of the State of California.

2. Plaintiff City of Corona is a duly incorporated municipal corporation within Riverside County organized and existing under the laws of the State of California.

3. The "Book Store" is a bookstore and motion picture arcade business located at 601 West Sixth Street, in the City of Corona, County of Riverside, California.

4. Plaintiffs are informed and believe and therefore allege that at all times mentioned herein the Defendant Helen E. Ebel was and is the lessee of the real property commonly known as 601 West Sixth Street in the City of Corona, and the sole owner of the bookstore and motion picture arcade business at that address, known as the "Book Store." Said defendant operates the business known as the "Book Store" under a license which was originally issued by the City of Corona on April 1, 1981. A copy of said license and renewal applications is attached hereto as Exhibit 1 and incorporated herein by reference as though set forth in full.

6. Plaintiffs are informed and believe and therefore allege that at all times mentioned herein the Defendant Thomas Charles Ebel was and is a manager or an acting manager or a person in charge of the "Book Store."

7. Plaintiffs are informed and believe and therefore allege that the Defendant Helen E. Ebel is the only person who is authorized to make management decisions relating

to the character and content of the stock-in-trade which is sold at the "Book Store" and the character and content of the arcade films which are exhibited at the "Book Store" and is the person who determines the manner in which the "Book Store" is operated and the course of conduct engaged in at the "Book Store."

8. Plaintiffs are informed and believe and therefore allege that the Defendant Eugene Van Zee is the owner of record of the real property known as 601 West Sixth Street, and that on or about March 30, 1981, the Defendant Eugene Van Zee leased said real property to the Defendant Helen E. Ebel by written agreement for a period of five (5) years. Defendant Helen E. Ebel took possession of the real estate and commenced operating the "Book Store" on or about March 30, 1981 and has continued to operate said bookstore as an "Adult Bookstore" since that date.

9. Defendant Does 1 through 10 have some ownership interest, legal or equitable, in the aforesaid real property, and/or are the operators, managers, acting managers, and/or are persons in charge of the business commonly known as the "Book Store." The true names or capacities, whether individual, plural, corporate, associate or otherwise of Does 1 through 10 are unknown to Plaintiffs who, therefore, sue said Defendants by such fictitious names and will ask leave of Court to amend this Complaint to show said Defendants' true names and capacities when the same have been ascertained. Each of the Defendants designated herein as Does 1 through 10 is responsible in some manner for the nuisances herein

described.

10. On June 1, 1983 the Plaintiff City of Corona entered into an "Agreement for Legal Services" and employed James J. Clancy as a Special Attorney to assist the City Council "in connection with the litigation to abate certain conditions within the City determined by the Council under the provisions of Ordinance No. 1689 to be public nuisances." A certified copy of said agreement is attached hereto as Exhibit 2 and incorporated by reference herein as though set forth in full.

11. On June 1, 1983 Ordinance No. 1689 entitled "An Ordinance of the City of Corona, California, Adding Chapter 9.16 to the Corona Municipal Code Relating To and Declaring Commercial Exploitation of Obscene Materials a Public Nuisance" was introduced at a regular meeting of the City Council of the City of Corona, AND ON JUNE 15, 1983 THE CITY COUNCIL OF THE CITY OF CORONA duly passed and adopted said ordinance. A certified copy of Ordinance No. 1689 is attached hereto as Exhibit 3 and incorporated herein by reference as though set forth in full.

12. Commencing on June 18, 1983 and continuing thereafter up to the date of filing of this First Amended and Supplemental Complaint, two (2) police officers of the City of Corona; namely, Lieutenant Larry Thayer and Detective Les Scott, at the direction of the City have conducted an investigation of the business practices of defendant Helen E. Ebel and Defendant Thomas Charles Ebel, and a third person, Gary Alan Zoellner, in relation to the operations of the "retail" section of the "Book Store." In the course of such

EXHIBIT 2

"Agreement for Legal Services" dated June 1, 1983, between City of Corona and James J. Clancy, attorney at law.

(Reference, page 4, line 8)

AGREEMENT FOR LEGAL SERVICES

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

W I T N E S S E T H:

Recitals:

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

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

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

A. Employment of Attorney

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

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

B. Payment For Services Rendered

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

$60.00 per hour for each hour of ATTORNEY's services, plus t of pocket office expenses incident to such employment, pro- ded, however, that with respect to each and every suit under- ken by ATTORNEY hereunder which results in a final judgement ainst CITY, said fee shall be reduced to $30.00 per hour, plus t of pocket office expenses incident to such employment, and ovided further that said fee of $60.00 shall also be reduced to 0.00 per hour, plus out of pocket office expenses incident to ch employment, in each and every suit undertaken by ATTORNEY reunder in which CITY is the successful party if and to the

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

C. Control of Litigation

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

D. Attorney An Independent Contractor

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

E. Term of Agreement

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

of its or his intention to terminate this Agreement.

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

CITY OF CORONA
A municipal corporation
State of California

By _____
Mayor

ATTEST:

_____
Clerk of the City of
, California

APPROVED AS TO FORM:

_____
Attorney

JAMES J. CLANCY, ESQ.

By _____
"ATTORNEY"

EXHIBIT B

jections can be overcome

The evidence admitted here established that Guillen suffered a prior serious felony conviction of residential burglary

VI

Prior to commencement of these criminal proceedings against Estrada, a wardship petition was apparently filed pursuant to Welfare and Institutions Code section 602 in the juvenile court. Initially, the juvenile court sustained the petition on two counts and adjudged Estrada to be a ward of the court. Upon its later determination that defendant was over the age of 18 at the time of the acts alleged in the petition, the juvenile court vacated the prior proceedings and adjudication impliedly for lack of subject matter jurisdiction

A new information was filed in the superior court alleging the identical charges except as to one count. Estrada entered a plea of not guilty and a plea of former judgment of conviction (Sec. 1016, subds. 2 and 4.) Estrada argues that the trial court's finding that he had not previously been in jeopardy was erroneous because jeopardy attached when he entered his plea in the juvenile court. (U.S. Const., Amends. V., XIV; Cal. Const., art. 1, Sec. 15.)[10]

The constitutional prohibition against double jeopardy is meant to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense. (**Green v. United States** (1957) 355 U.S. 184, 187.) Jeopardy ordinarily attaches in a Welfare and Institutions Code section 602 case when the juvenile is "put to trial before the trier of facts" at the adjudicatory hearing or when the adjudicatory hearing is "entered upon." (**Breed v. Jones** (1975) 421 U.S. 519, 531; **Richard M. v. Superior Court** (1971) 4 Cal.3d 370, 376; **In re Hurlic** (1977) 20 Cal.3d 317, 321.)

However, before jeopardy may attach, it is essential that a court have subject matter jurisdiction over the proceedings. "Both the history of the Double Jeopardy Clause and its terms demonstrate that it does not come into play until a proceeding begins before a trier 'having jurisdiction to try the question of the guilt or innocence of the accused.' (Citations.)" (**Serfass v. United States** (1975) 420 U.S. 377, 391, see also **Richard M. v. Superior Court, supra**, 4 Cal.3d at p. 376.)

In **In re Shanea J.** (1984) 150 Cal.App.3d 831, the court held that a juvenile court lacked jurisdiction to adjudicate the appellant to be a ward under a section 602 petition. The court concluded that a subsequent criminal prosecution in superior court would not violate either the California or federal prohibitions against double jeopardy. (**Id.** at p. 843.) We agree that where substantive proceedings before a court are void for lack of subject matter jurisdiction, there is no double jeopardy bar against subsequent proceedings in a court with jurisdiction over an offense. (See **Ball v. United States** (1896) 163 U.S. 662, 669; **People v. Hamberg** (1890) 84 Cal. 468, 472; **People v. Zadro** (1937) 20 Cal.App.2d 320, 321-323; cf. **Benton v. Maryland** (1969) 395 U.S. 784, 796-797 [double jeopardy plea valid where first court had jurisdiction of the cause and indictment upon which defendant initially tried only voidable, not absolutely void].)

Accordingly, the judgment of each defendant is affirmed

CERTIFIED FOR PARTIAL PUBLICATION

ABBE, J.

We Concur:

STONE, P. J.

GILBERT, J.

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* This opinion is certified for partial publication pursuant to rule 976.1 of the California Rules of Court. Including the disposition, the following portions are certified for publication:

All of the text appearing on page 1 and ending with the word "judgments" on line 9 of page 2.

All of the text after Roman numeral "II" appearing at the top of page 8 and ending with the word "applicable" appearing on line 11 of page 23.

All of the text after Roman numeral "V" on page 27 and ending with the word "burglary." on line 3 of page 33.

1 All offenses allegedly occurred in September of 1982.

2 As did the court in **People v. Rojas, supra**, 118 Cal.App.3d at p. 287, we compare the Penal Code section 1538.5 procedure for determining the constitutionality of a search and seizure. Under that section, a court may be required to resolve factual issues before deciding the legal question. Yet, we are unaware of any challenge to this procedure on the ground that it is violate of the constitutional right to a jury trial.

3 Section 185 of the Code of Civil Procedure, enacted in 1872, provides: "Every written proceeding in a court of justice in this state shall be in the English language, and judicial proceedings shall be conducted, preserved, and published in no other."

4 Although **Aguilar** discusses the trinary function of in-court interpreters, it does not address whether the right to a "defense" interpreter is derived from the express constitutional right to an interpreter provision or is derived as a necessary corollary from the right to an attorney (Cal. Const., art. 1, Sec. 15).

5 (See e.g. **People v. Carreon** (1984) 151 Cal.App.3d 559; **People v. Romero** (1984) 153 Cal.App.3d 757; **In re Dung T.** (1984) 160 Cal.App.3d 697; **People v. Nieblas** (1984) 161 Cal.App.3d 527.)

6 Implicit is a finding that untranslated court proceedings other than the exchange with the two non-English speaking witnesses occurred while the interpreter was on loan, or for some undisclosed reason the defendant could not understand or hear the questions posed to and the answers of those witnesses even though at least one of them spoke Spanish (the other had a Spanish surname), or defendant was entitled to, but lacked, a Spanish translation of the English interpretation of the non-English speaking witnesses' testimony. The court indicated that the Spanish-speaking ability of defendant's counsel, as to which the record was silent, would have made no dif-

10 The standard of prejudice may differ depending upon whether the impaired interpreter services were "defense" or proceedings."

11 Implicitly, the court in both **People v. Resendez, supra**, and **People v. Rios, supra**, found that the appellant was entitled to an interpreter acting in a "defense" capacity. In **People v. Resendez, supra**, 164 Cal.App.3d 812, it appears that the interpreter undertook "defense" interpretation responsibilities for multiple defendants. There, the judge authorized codefendants sharing an interpreter to interrupt the proceedings by raising a hand any time they wanted to communicate with counsel. In **People v. Rios** (1984) 161 Cal.App.3d 905, four Spanish speaking codefendants shared a single interpreter through use of earphones and headsets. The court stated: "Under

Bruce A. Thompson, Judge

Superior Court County of Ventura

Jeffrey D. Scharf, under appointment by the Court of Appeal, for defendant and appellant Estrada.

Andrew Radel, under appointment by the Court of Appeal, for defendant and appellant Guillen.

John Van de Kamp, Attorney General, Susanne C. Wylie, Supervising Deputy Attorney General, Robert S. Henry, Deputy Attorney General, for Plaintiff and Respondent.

ATTORNEYS

Court Holds Representing City For Contingent Fee Unlawful

Cite as 85 Daily Journal D.A.R. 3223

THE PEOPLE ex rel. JAMES J. CLANCY, as City Attorney, etc., et al.,
Petitioners,
v.
THE SUPERIOR COURT OF RIVERSIDE COUNTY
Respondent,
HELEN E. EBEL et al.,
Real Parties in Interest.

HELEN E. EBEL et al.,
Petitioners,
v.
THE SUPERIOR COURT OF RIVERSIDE COUNTY,
Respondent,
THE PEOPLE ex rel. JAMES J. CLANCY, as City Attorney, etc., et al.,
Real Parties in Interest.

LA No. 32041
Super. Ct. No. 160775
California Supreme Court
Filed September 16, 1985

We evaluate the propriety of a contingent fee arrangement between a city government and a private attorney whom it hired to bring abatement actions under the city's nuisance ordinance. We hold the arrangement inappropriate under the circumstances, and in the interests of justice grant the extraordinary relief of disqualifying the attorney.

In 1981 Helen Ebel obtained a business license from petitioner City of Corona (City), and began operating a business known as the Book Store. The Book Store sells sexually explicit reading materials and provides an arcade section for viewing sexually explicit films. This action arises from the City's efforts to close the Book Store.

Within a few months after Ebel opened for business the City adopted two ordinances regulating adult bookstores, one defining "sex oriented material," and the other restricting the sale of such material to certain zones in the City. The city manager informed Ebel she would be compelled to move the Book Store because it was within 750 feet of a church that operated a school for minors. Ebel filed an action in federal

curred while the interpreter was on loan, or for some unascertained reason the defendant could not understand or hear the questions posed to and the answers of those witnesses even though at least one of them spoke Spanish (the other had a Spanish surname), or defendant was entitled to, but lacked, a Spanish translation of the English interpretation of the non-English speaking witnesses' testimony. The court indicated that the Spanish-speaking ability of defendant's counsel, as to which the record was silent, would have made no difference to its determination since bilingual counsel should not be expected to translate proceedings while functioning as an attorney. People v. Aguilar, supra, 35 Cal.3d at p. 791.)

7. Often the facts critical to an interpreter claim are going to be outside the record, as in this case, since attorney-client communications and oral proceedings in a non-English language are not preserved in the clerk's or reporter's transcripts. Thus, such claims would be correctly addressed on a petition for writ of habeas corpus, rather than on appeal, so that the factual bases supporting a defendant's assertions may be examined at an evidentiary hearing. (Cf. People v. Pope (1979) 23 Cal.3d 412.)

8. The following exchange occurred prior to the testimony of the Spanish-speaking defense witness called on behalf of Guillen: "MR. STEINFELD (Guillen's counsel): . . . We call Ricardo Aguilar to the stand. Mr. Aguilar is also going to require an interpreter. THE COURT: All right. Counsel, we have only one interpreter, and if I take the time now to get another one for Mr. Aguilar, we are gonna . . . it is gonna take five minutes, ten minutes. — MR. ARNOLD (Estrada's counsel): She can handle it. THE COURT: Can we stipulate that Miss Bowen can be the interpreter for all three — Martinez. I am sorry, excuse me I get my head in a rut. ( ) In any event, I am going to have you separately sworn to interpret for Mr. Aguilar, but I want you to speak up so that the defendants can hear everything that you say in both languages." The following colloquy took place before the same defense witness returned to the stand for further examination. "THE COURT: . . . at all prior hearings involving the use of our interpreter, Ms. Martinez, first of all she has acted by stipulation and agreement of all counsel as the interpreter for the witness Aguilar. Is it agreed that she may continue to act as the interpreter for each of those three persons?' MR. WHIPPLE (Guillen's attorney): Guillen agrees. THE COURT: All right. And, Mr. Whipple, since you weren't here before, what arrangements I made was to have the interpreter seat herself in such a way that all three of the persons, Mr. Guillen, Mr. Estrada and Mr. Aguilar (Guillen's witness), all three of them can hear the interpreter's interpretation from Spanish to English and English to Spanish at the same time. She seats herself in such a way that her voice carries to each of the persons involved, and each of them can hear her as she interprets. . . .' Presumably, Guillen understood the questions put to and answers made by his own witness in Spanish. We note the attorneys' apparent stipulation regarding use of a single interpreter does not dispel the claim of error since "(t)he mere acquiescence by counsel did not waive the right to interpreter assistance" and a valid waiver requires an affirmative showing on the record that the defendant voluntarily and intelligently waived the right. (People v. Aguilar, 35 Cal.3d 785, 794), which the record does not demonstrate.

9. The court also commented by way of footnote: "Accuracy is required to protect the integrity of the proceedings as well as the defendant's rights. When no defense interpreter is available, it is impossible for the non-English speaking defendant to check the accuracy or competency of the witness interpreter's translation. . . ." (People v. Aguilar, supra, 35 Cal.3d at p. 793, fn. 10.) We believe this is a red herring. To hold that a non-English speaking defendant's constitutional right to a "proceedings" interpreter requires translation of the English interpretation of the testimony of a non-English speaking witness who speaks the same language as the defendant on the ground that it is a check on the "witness' translation would place a non-English speaking defendant in a better position than an English speaking defendant who has no interpreter assistance to verify the accuracy or competency of "witness" interpretation.

supra, 164 Cal.App.3d 812, it appears that the interpreter undertook "defense" interpretation responsibilities for multiple defendants. There, the judge authorized codefendants sharing an interpreter to interrupt the proceedings by raising a hand any time they wanted to communicate with counsel. In People v. Rios (1984) 161 Cal.App.3d 905, four Spanish speaking codefendants shared a single interpreter through use of earphones and headsets. The court stated: "Under these circumstances it is not realistic to expect defendant Rioz to be able to communicate with his lawyer at any time the need arises. . . ." (Id. at p. 912.)

12. See for example, People v. Carreon (1984) 151 Cal.App.3d 559 (reversible if record supports an informed speculation that defendant's right to an interpreter prejudiced); In re Dung T. (1984) 160 Cal.App.3d 697 (reversible per se); People v. Rios (1984) 161 Cal.App.3d 905, 913-914 (unnecessary to resolve whether reversible per se, reversible under Chapman v. California (1967) 386 U.S. 18, or reversible under Carreon standard).

13. A Harvey-Madden objection is not raised on appeal. See People v. Harvey (1958) 156 Cal.App.2d 516, People v. Madden (1970) 2 Cal.3d 1017.)

14. Section 667 provides in pertinent part: "(a) Any person convicted of a serious felony who previously has been convicted of a serious felony in this state or of any offense committed in another jurisdiction which includes all of the elements of any serious felony, shall receive, in addition to the sentence imposed by the court for the present offense, a five-year enhancement for each such prior conviction on charges brought and tried separately. The terms of the present offense and each enhancement shall run consecutively. . . . (d) As used in this section 'serious felony' means a serious felony listed in subdivision (c) of Section 1192.7."

15. Guillen's attorney unsuccessfully objected to the probation report on the basis of relevancy. The court's ruling on relevancy was correct since it cannot be said that the probation report had no tendency in reason to prove that the prior burglary was of a residence. (See Evid. Code, Secs. 351, 210.) However, since the report involved multiple level hearsay, it might have been susceptible to an objection on that ground, but none was interposed. (Evid. Code, Sec. 1280.) Thus, such claim was waived as is any claimed erroneous admission of evidence absent a timely objection or motion to strike or exclude. (Evid. Code, Sec. 353.)

16. The plea form alone was not sufficient to establish that the burglary was of a residence since it does not state whether the house entered was inhabited. The term "residence" implies inhabitation (People v. O'Bryan (1985) 37 Cal.3d 841, 844-845) and a house may be uninhabited. (See People v. Cardona (1983) 143 Cal.App.3d 481, 483.)

17. It is well settled that recidivism statutes prescribing increased punishment for repeat offenders do not place a defendant twice in jeopardy. (Gryger v. Burke (1948) 334 U.S. 728, 732; In re McVickers (1944) 23 Cal.2d 264, 271.) Moreover, in making sentencing choices, courts routinely consider certain facts relating to a defendant's past conduct which were not facts adjudicated in a prior criminal proceeding. (Pen. Code, Sec. 1170; Cal. Rules of Court, rules 414 (d), 421 (b).)

18. The 5th Amendment of the United States Constitution, made applicable to the states by the 14th Amendment (Benton v. Maryland (1969) 395 U.S. 784, 795-796), provides in pertinent part: ". . . (N)or shall any person be subject for the same offense to be twice put in jeopardy of life or limb. . . ." The pertinent part of article I, section 15, of the California Constitution provides to the same effect: "Persons may not twice be put in jeopardy for the same offense. . . ."

City adopted two ordinances regulating adult bookstores, one defining "sex oriented material" and the other restricting the sale of such material to certain zones in the City. The city manager informed Ebel she would be compelled to move the Book Store because it was within 750 feet of a church that operated a school for minors. Ebel filed an action in federal court attacking the constitutionality of these ordinances. The circuit court of appeals directed entry of a preliminary injunction in her favor. (Ebel v. City of Corona (9th Cir. 1983) 698 F.2d 390.) The district court thereafter held the ordinances unconstitutional and granted a permanent injunction, and the judgment was affirmed on appeal. (Ebel v. City of Corona (9th Cir. Aug. 1, 1985) ___ F.2d ___.)

Frustrated by its defeats in federal court on the constitutional issues, the City retained the services of Attorney James J. Clancy to abate nuisances under a new ordinance proposed on the same day. The ordinance defined a public nuisance as "Any and every place of business in the City . . . in which obscene publications constitute all of the stock in trade, or a principal part thereof. . . ." Clancy had drafted this and the previous ordinances relating to the sale of sexually explicit material, and had presented them for consideration by the City Council. He is associated with an organization entitled Committee for Decency through Law.

Two weeks later the ordinance was passed. Following an investigation by the police department, the City adopted a resolution declaring the Book Store to be a public nuisance and revoking its business license. A complaint was filed, on the relation of the City and Clancy as its "special attorney," against Ebel, her son Thomas Ebel, Eugene Van Zee, and the Book Store, for abatement of a public nuisance, declaratory judgment, and an injunction. Police officers were sent to the Book Store to photograph the magazines on sale and the movies available for viewing. The City then served a subpoena duces tecum on Timothy Groover, a clerk at the store.[1] The subpoena demanded that Groover (now, Thomas Ebel) appear in court and produce the 262 publications that the police had photographed, to permit the court to determine whether the publications are obscene.

The court allowed the City to amend its complaint by substituting "City Attorney of Corona" as Clancy's title in the action, and granted defendants' motion to prevent production of the magazines. The City petitions for writ of mandate to compel the court to vacate its order that Thomas Ebel need not bring the magazines to court, and to order Helen Ebel to produce the magazines. The Ebels cross-petition to compel the court to vacate its order denying defendants' motion to disqualify Clancy as attorney for the City, and its order permitting plaintiffs to amend the complaint. They also seek a writ of prohibition to bar the People from proceeding with Clancy instead of the regular City Attorney of Corona as its representative, and from permitting the City to proceed as a Party.

1. Enforcement of the Subpoena Duces Tecum

The parties hotly debate the issue whether the subpoena duces tecum, which orders Thomas Ebel to produce 262 magazines offered for sale at the Book Store, violates his

255, 261, fn. 4. People v. Municipal Court (Byars) 77 Cal.App.3d 294, 298-299.) Thus we may order that Clancy be dismissed from the case if we find the contingent fee arrangement prejudices the Ebels.

In People v. Superior Court (Greer), supra, 19 Cal.3d 255, we reviewed the responsibilities associated with the prosecution of a criminal case. "The prosecutor is a public official vested with considerable discretionary power to decide what crimes are to be charged and how they are to be prosecuted. [Citations.] In all his activities, his duties are conditioned by the fact that he 'is the representative not of any [sic] ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.' " (Id. at p. 266, quoting Berger v. United States (1935) 295 U.S. 78, 88.) The American Bar Association's Code of Professional Responsibility elaborates on the public prosecutor's duty to seek justice: "This special duty exists because: (1) the prosecutor represents the sovereign and therefore should use restraint in the discretionary exercise of governmental powers, such as in the selection of cases to prosecute. (2) during trial the prosecutor is not only an advocate but he also may make decisions normally made by an individual client, and those affecting the public interest should be fair to all . . . " (ABA Code of Prof. Responsibility, EC 7-13.)

Thus a prosecutor's duty of neutrality is born of two fundamental aspects of his employment. First, he is a representative of the sovereign; he must act with the impartiality required of those who govern. Second, he has the vast power of the government available to him; he must refrain from abusing that power by failing to act evenhandedly. These duties are not limited to criminal prosecutors: "A government lawyer in a civil action or administrative proceeding has the responsibility to seek justice and to develop a full and fair record, and he should not use his position or the economic power of the government to harass parties or to bring about unjust settlements or results." (Id., EC 7-14.)

Not only is a government lawyer's neutrality essential to a fair outcome for the litigants in the case in which he is involved, it is essential to the proper function of the judicial process as a whole. Our system relies for its validity on the confidence of society; without a belief by the people that the system is just and impartial, the concept of the rule of law cannot survive. (See id., EC 9-1, 9-2.)

When a government attorney has a personal interest in the litigation, the neutrality so essential to the system is violated. For this reason prosecutors and other government attorneys can be disqualified for having an interest in the case extraneous to their official function. For example, in People v. Superior Court (Greer), supra, 19 Cal.3d 255, we disqualified the prosecutor because a woman working in his office was the victim's mother, was a material witness, and stood to gain custody of the victim's children if the defendant was convicted. In Tumey v. Ohio (1927) 273 U.S. 510, the United States Supreme Court outlawed a system whereby fees in which the court refused to enforce a contingent fee contract calling for a larger fee if the defendant was convicted, for a lawyer assisting a prosecuting attorney. The court declared that the contingent element was against public policy because it tended to bring about conviction regardless of the prosecutor's primary duty to see that justice was done." (MacKinnon, Contingent Fees for Legal Services (1964) p. 52.) More strongly worded is the comment to standard 2.3(e) of the American Bar Association Standards Relating to the Prosecution Function: "It is clear that [case-by-case] fee systems of remuneration for prosecuting attorneys raise serious ethical and perhaps constitutional problems, are totally unacceptable under modern conditions, and should be abolished promptly."

The justification for the prohibition against contingent fees in criminal actions extends to certain civil cases. As discussed above, the rigorous ethical duties imposed on a criminal prosecutor also apply to government lawyers generally. "The county attorney is a county officer and as such is a representative of the people, although his duties relate only to civil matters." (ABA Committee on Prof. Ethics, opn. No. 188 (1938).)

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. (See, e.g., Denio v. City of Huntington Beach (1943) 22 Cal.2d 580 [contingent fee arrangement whereby the city hired a law firm to represent it in all matters relating to the protection of its oil rights].) But just as certainly there is a class of civil actions that demands the representative of the government to be absolutely neutral. This requirement precludes the use in such cases of a contingent fee arrangement.

In City of Los Angeles v. Decker (1977) 18 Cal.3d 860, we held applicable to an eminent domain action the requirement that government attorneys be unaffected by personal interests: "Occupying a position analogous to a public prosecutor, [the government attorney] is 'possessed . . . of important governmental powers that are pledged to the accomplishment of one objective only, that of impartial justice.' (Professional Responsibility: Report of the Joint Conference (1958) 44 A.B.A.J. 1159, 1218.) The duty of a government attorney in an eminent domain action, which has been characterized as 'a sober inquiry into values, designed to strike a just balance between the economic interests of the public and those of the landowner' [citation], is of high order." (Id. at p. 871.)

Similarly, the abatement of a public nuisance involves a balancing of interests. On the one hand is the interest of the people in ridding their city of an obnoxious or dangerous condition; on the other hand is the interest of the landowner in using his property as he wishes. And when an establishment such as an adult bookstore is the subject of the abatement action, something more is added to the balance: not

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TRIAL COURT & NUMBER:
Riverside Superior Court
No. 160775

TRIAL JUDGE:
Hon. J. David Hennigan

1. Groover was subsequently discharged. By stipulation the parties have deemed the subpoena to have been served on Thomas Ebel, currently a clerk at the Book Store.

2. The City also seeks a writ to compel Helen Ebel to produce the magazines. But no subpoena was served on Helen Ebel, and this request was never presented to the trial court. In addition, since we conclude that Thomas Ebel may not claim the protection of the Fifth Amendment in this case, the issue is moot.

3. Clancy relies on an Indiana authority, Sedelbauer v. State (Ind.App. 1984) 455 N.E.2d 1159. In that case, however, the court approved the assistance of a private attorney "only because he appeared 'not in place of the State's duly authorized counsel.' " (Id., at p. 1164.)

4. Although Clancy prepared the ordinance for the City, and used a personal employment contract he had prepared for other cities, it appears he may have little discretion in the decision whether to bring an action under the public nuisance ordinance; he does so at the direction of the city council. However, as we emphasized in the criminal arena, "the prosecutor's discretionary functions are not confined to the period before the filing of charges. [W]hile the trial judge has the power to prevent actual prosecutorial misconduct in court, within those bounds the district attorney possesses the advocate's traditional ability to conduct his case in the manner he elects. [Citations.] A district attorney may thus prosecute vigorously, but both the accused and the public have a legitimate expectation that his zeal, as reflected in his tactics at trial, will be born of objective and impartial consideration of each individual case." (People v. Superior Court (Greer), supra, 19 Cal.3d 255, 267.)

5. Code of Civil Procedure section 731 provides in part that "A civil action may be brought in the name of the people of the State of California to abate a public nuisance . . . by the district attorney of any county in which such nuisance exists, or by the city attorney of any town or city in which such nuisance exists . . ." The Ebels maintain this provision makes it improper for the City instead of the State to bring this suit. But cities have long maintained public nuisance actions. (See County of Sierra v. Butler (1902) 136 Cal. 547.) In section 731 the Legislature meant to allow cities, as well as the state, to continue to bring such actions: the statute gives district attorneys and city attorneys the concurrent right to file such suits, and even Provides that the city attorney "must bring" the action if directed to do so by the legislative authority of the city.

The Ebels argue further that section 731 makes it improper for Clancy instead of the official attorney of Corona to prosecute the action. The point may seem technical in this case, but could become crucial if a city council and its city attorney differed as to whether a nuisance action should be brought. Thus on remand the action herein should be brought in the name of Dallas Holmes, the Corona City Attorney. The City may hire Clancy to represent Holmes. (Gov. Code, § 37103.

privilege against self-incrimination.[2] Thomas Ebel is potentially subject to prosecution under Penal Code section 311.2, which prohibits the sale of obscene material. The parties agree that certain elements of the crime have been established by independent evidence (i.e., existence, possession, and authentication), and thus the act of producing the magazines is to that extent not "testimonial" and "incriminating." (See Fisher v. United States (1976) 425 U.S. 391, 408.) However, the parties disagree whether the element of scienter, which must be proved in order to convict, has been established by other evidence and whether it would be established by the act of gathering the magazines and bringing them into court.

We need not reach this question. The Fifth Amendment cannot be "employed by an individual to avoid production of the records of an organization, which he holds in a representative capacity as custodian on behalf of the group. . . . [T]he papers and effects which the privilege protects must be the property of the person claiming the privilege, or at least in his possession in a purely personal capacity." (Bellis v. United States (1974) 417 U.S. 85.) This rule applies even if the evidence might incriminate the holder personally. (Id. at p. 88.) The magazines named in the subpoena duces tecum are the property of the Book Store, an artificial entity that cannot claim the privilege against self-incrimination. (Id. at p. 90.) Thomas Ebel has possession of the magazines only in his capacity as a clerk at the Book Store. He therefore cannot avoid compliance with the subpoena.

II. The Contingent Fee Arrangement

The contract of employment between the City and Clancy contains a fee provision according to which Clancy is to be paid $60 per hour, "provided, however, that with respect to each and every suit undertaken by Attorney hereunder which results in a final judgment against CITY, said fee shall be reduced to $30.00 per hour . . . and provided further that said fee of $60.00 shall also be reduced to $30.00 per hour . . . in each and every suit undertaken by ATTORNEY hereunder in which CITY is a successful party if and to the extent that the CITY does not recover its attorney's fees from the unsuccessful party or parties."

The Ebels contend it is improper for an attorney representing the government to have a financial stake in the outcome of an action to abate a public nuisance. They maintain that a government attorney prosecuting such actions must be neutral, as must an attorney prosecuting a criminal case. Accordingly, we must first examine the requirement of neutrality imposed on government attorneys in certain cases, and then determine whether this requirement applies to attorneys prosecuting public nuisance actions.

At the outset we emphasize that the courts have authority to disqualify counsel when necessary in the furtherance of justice. (Code Civ. Proc., § 128, subd. (a)(5); William H. Raley Co. v. Superior Court (1983) 149 Cal.App.3d 1042, 1048; see also People v. Superior Court (Greer) (1977) 19 Cal.3d 255, 261, fn. 4; People v. Municipal Court (Byars) 77 Cal.App.3d 294, 298-299.) Thus we may order that Clancy be dismissed from the case if we find the contingent fee arrangment prejudices the Ebels.

In People v. Superior Court (Greer), supra, 19 Cal.3d 255, we reviewed the responsibilities associated with the prosecu- ... the mayor of a town served as judge in liquor possession cases in which the punishment was a fine. The money paid pursuant to the fine went into a fund from which the mayor could recover his costs for hearing the case. And in Ward v. Village of Monroeville (1972) 409 U.S. 57, an Ohio statute authorizing mayors to sit in ordinance violation cases, the fines from which would go into the municipality's coffers, was held unconstitutional. "[T]he test is whether the mayor's situation is one 'which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the state and the accused . . . .' " (Id. at p. 60, quoting, Tumey, supra, 273 U.S. at p. 532; see also People v. Conner (1983) 34 Cal.3d 141 [conflict of interest where deputy district attorney was a witness to and arguably a victim of the criminal conduct being prosecuted by others in his office].)

A city attorney is a public official. (People ex rel. Chapman v. Rapsey (1940) 16 Cal.2d 636, 639.) The American Bar Association's Code of Professional Responsibility addresses the special considerations applicable to a lawyer who is also a public official: "A lawyer who is a public officer, whether full or part-time, should not engage in activities in which his personal or professional interests are or foreseeably may be in conflict with his official duties." (ABA Code of Prof. Responsibility, EC 8-8.) "[A]n attorney holding public office should avoid all conduct which might lead the layman to conclude that the attorney is utilizing his public position to further his professional success or personal interests." (ABA Committee on Prof. Ethics, opn. No. 192 (1939); see also People v. Conner, supra, 34 Cal.3d 141, 146.)

It is true that the retainer agreement between the City and Clancy provides that Clancy is to be "an independent contractor and not an officer or employee of City." However, a lawyer cannot escape the heightened ethical requirements of one who performs governmental functions merely by declaring he is not a public official. The responsibility follows the job: if Clancy is performing tasks on behalf of and in the name of the government to which greater standards of neutrality apply, he must adhere to those standards.

In the case at bar, Clancy has an interest in the result of the case: his hourly rate will double if the City is successful in the litigation. Obviously this arrangement gives him an interest extraneous to his official function in the actions he prosecutes on behalf of the City.

Contingent fee contracts for criminal prosecutors have been recognized to be unethical and potentially unconstitutional, but there is virtually no law on the subject. "[T]he contingent fee is generally considered to be prohibited [in] the prosecution and defense of criminal cases. However, there are so few cases, and these are predominantly old, that it is doubtful that there can be said to be any current law on the subject. Usually cited is a 1920 case from New Mexico in which the court refused to enforce a contingent fee contract calling for a larger fee if the defendant was convicted, for a lawyer assisting a prosecuting attorney. The court declared that the contingent element was against public policy because it tended to bring about conviction regardless of the prosecutor's primary duty to see that justice was ...

only does the landowner have a First Amendment interest in selling protected material, but the public has a First Amendment interest in having such material available for purchase. Thus, as with an eminent domain action, the abatement of a public nuisance involves a delicate weighing of values. Any financial arrangement that would tempt the government attorney to tip the scale cannot be tolerated.

Public nuisance abatement actions share the public interest aspect of eminent domain and criminal cases, and often coincide with criminal prosecutions. These actions are brought in the name of the People by the district attorney or city attorney. (Code Civ. Proc., § 731.)[3] A person who maintains or commits a public nuisance is guilty of a misdemeanor. (Pen. Code, § 372.) "A public or common nuisance . . . is a species of catch-all criminal offense, consisting of an interference with the rights of the community at large. . . . As in the case of other crimes, the normal remedy is in the hands of the state." (Prosser & Keeton, The Law of Torts (5th ed. 1984) p. 618; see also Board of Supervisors v. Simpson (1957) 36 Cal.2d 671, 672-675.) A suit to abate a public nuisance can trigger a criminal prosecution of the owner of the property. This connection between the civil and criminal aspects of public nuisance law further supports the need for a neutral prosecuting attorney.[4]

Thus we hold that the contingent fee arrangement between the City and Clancy is antithetical to the standard of neutrality that an attorney representing the government must meet when prosecuting a public nuisance abatement action. In the interests of justice, therefore, we must order Clancy disqualified from representing the City in the pending abatement action.[5]

Let a writ of mandate issue directing the court to vacate its order that Thomas Ebel need not produce the magazines listed in the subpoena, and issue a new order enforcing the subpoena and dismissing Clancy as the City's attorney in the pending action. In all other respects the petition is denied.

MOSK, J.

We Concur:
BIRD, C.J.
KAUS, J.
BROUSSARD, J.
REYNOSO, J.
GRODIN, J.
LUCAS, J.

COUNSEL FOR THE PARTIES
FOR PETITIONERS:
James J. Clancy, Esq.
9055 La Tuna Canyon Rd.
Sun Valley, CA 91352
(818) 352-2069

FOR REAL PARTIES IN INTEREST:
Roger Jon Diamond, Esq.
Hecht, Diamond & Greenfield
15415 Sunset Blvd.
Pacific Palisades, CA 90272
(213) 454-0621

EXHIBIT C

ORIGINAL

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE ex rel. JAMES J. CLANCY, as City Attorney, etc., et al., Petitioners, v. THE SUPERIOR COURT OF RIVERSIDE COUNTY, Respondent; HELEN E. EBEL et al., Real Parties in Interest.	L.A. 32041 Superior Court No. 160775
HELEN E. EBEL et al., Petitioners, v. THE SUPERIOR COURT OF RIVERSIDE COUNTY, Respondent; THE PEOPLE ex rel. JAMES J. CLANCY, as City Attorney, etc., et al., Real Parties in Interest.	

SUPREME COURT
FILED
OCT 1 1985
Clerk
DEPUTY

PETITION FOR REHEARING

JAMES J. CLANCY
9055 LA TUNA CANYON ROAD
SUN VALLEY, CA 91352
(818) 352-2069

Attorney for Petitioners.

10-16

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE ex rel. JAMES J. CLANCY, as City Attorney, etc., et al., Petitioners, v. THE SUPERIOR COURT OF RIVERSIDE COUNTY, Respondent; HELEN E. EBEL et al., Real Parties in Interest.	L.A. 32041 Superior Court No. 160775 PETITION FOR REHEARING
HELEN E. EBEL et al., Petitioners, v. THE SUPERIOR COURT OF RIVERSIDE COUNTY, Respondent; THE PEOPLE ex rel. JAMES J. CLANCY, as City Attorney, etc., et al., Real Parties in Interest.	

TO THE HONORABLE CHIEF JUSTICE, AND TO THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

(D) THE MISSTATEMENTS OF FACT AND LAW IN THE COURT'S OPINION THAT: (1) THE CITY ATTORNEY HAD NOT GIVEN HIS APPROVAL TO THE AMENDMENT TO THE COMPLAINT, AND (2) THAT ATTORNEY CLANCY WAS NOT REPRESENTING THE CITY ATTORNEY OF THE CITY OF CORONA ARE MATERIAL MISSTATEMENTS IN THAT, WITHOUT THEM, THE COURT'S ANALYSIS IS UNDERMINED AND ITS RULING THAT ATTORNEY CLANCY'S DISMISSAL IS AUTHORIZED CANNOT STAND.

The misstatements of fact and law in the Court's opinion that: (1) the City Attorney had not given his approval to the amendment to the complaint, and (2) that Attorney Clancy was not representing the City Attorney of the City of Corona are "material" in that they constitute the singular basis for the Court's analysis and the Court's mandate "dismissing Clancy as the City's attorney in the pending action."

Petitioners submit that the contrary finding and Order of Judge Hennigan that: (1) the City Attorney had given his approval to the amendment to the complaint, and (2) that Attorney Clancy was representing the City Attorney of the City of Corona, and the terms of the written contract which specifically provide as to such employment:

" A. Employment of Attorney

City hereby agrees to employ attorney, for the fees hereinafter spedified, to assist the City Attorney of CITY, when and as requested by said City Attorney to do so, in connection with litigation to abate certain conditions within the CITY, determined by the Council under the provisions of Ordinance No. 1689 to be pulic nuisances, or to defend the CITY if it should be named . . .

". . . .

" C. Control of Litigation

ATTORNEY agrees that each and every case, suit or proceeding in which he undertakes to assist the City Attorney of CITY, as aforesaid, shall be and remain under the subject

> to the control and direction of said City Attorney or the City Council of CITY at all stages, and that he shall at all times keep said City Attorney informed of all matters pertaining thereto."

undermine the Court's analysis that dismissal is authorized.

Under the above written terms of the City's contract, the control and direction of the case is in the hands of the City Attorney, not Attorney Clancy. Further, as this Court concluded in its opinion at page 16, footnote 5:

> "Thus on remand the action herein should be brought in the name of Dallas Holmes, the Corona City Attorney. The City may hire Clancy to represent Holmes. (Govt. Code §37103)"

In this regard, Government Code § 37103 provides city councils the following specific authority:

> "§ 37103. Contracts for special services and advice: Compensation
>
> The legislative body may contract with any specially trained and experienced person, firm, or corporation for special services and advice in financial, economic, accounting, engineering, legal or administrative matters.
>
> "It may pay such compensation to these experts as it deems proper." (Our emphasis.)

1.

(E) THE COURT'S ANALYSIS PRESENTS AN IRRECONCILABLE CONFLICT BETWEEN THE COURT'S "ASSUMPTIONS" (MISREPRESENTATIONS OF OPPOSING COUNSEL AT ORAL ARGUMENT ON JUNE 12, 1985) AND THE SPECIFIC TERMS OF THE CONTRACT.

The analysis in the Court's opinion presents an irreconcilable conflict. The central issue is the construction to be given to the written contract between Attorney Clancy and the City of Corona. The Court's analysis concludes that the contingency provision is against public policy and must be set

aside because Attorney Clancy is not under the control of the City Attorney of the City of Corona, yet the terms of the written contract, as noted above in Point 1.(D), define the legal relationship between Attorney Clancy and the City Attorney to be one in which Attorney Clancy is under the control of the City Attorney. At oral argument on June 12, 1985, Attorney Clancy requested this Court to examine the misrepresentations of facts and arguments of opposing counsel in the light of the specific terms of the written contract which define the contractual relationship to be entirely different from that which the "Book Store" attorney was "arguing" to the Court.

1.

(F) AN AUGMENTATION OF THE RECORD UPON REHEARING WILL ESTABLISH THAT ATTORNEY CLANCY, BY LETTER DATED APRIL 12, 1984 AND EIGHT DAYS PRIOR TO THE HEARING ON THE MOTION TO AMEND, TRANSMITTED A COPY OF THE PROPOSED AMENDED COMPLAINT TO CITY ATTORNEY DALLAS HOLMES WITH A PROPOSED DRAFT OF AN AMENDING RESOLUTION WHICH WAS THEREAFTER PRESENTED TO AND ADOPTED BY THE CITY COUNCIL AS RESOLUTION NO. 84-35.

Petitioners' counsel makes the following offer of proof in support of this Petition for Rehearing:

"That if Petitioners' Petition for Rehearing is granted, and the record is augmented to include Attorney Clancy's letter of April 12, 1984 to City Attorney Dallas Holmes, said record will establish that a copy of the motion to amend the complaint and a copy of the proposed amendment to the complaint was sent to City Attorney Dallas Holmes eight days before the hearing on the motion (see copy of amendment at Exhibit C to Real Parties in Interest Cross-Petition, on file in this Court), with a recommendation that City Attorney Dallas Holmes present to the City Council an amendment to Resolution 83-102, directing that the special counsel commence the action "on the relation of the City Attorney of Corona", which thereafter City Attorney Dallas Holmes did, in fact, present to the City Council and which the City Council did, in fact, pass as Resolution 84-35 (see copy at Exhibit 2

to the Replication on file in this Court).

A copy of said letter of Attorney James J. Clancy to City Attorney Dallas Holmes, dated April 12, 1984, in support of said offer of proof appears on the page following this offer of proof.

Petitioners submit that the above offer of proof confirms Attorney Clancy's representation to the trial court at oral argument on April 20, 1985, and Judge Hennigan's Finding of Fact and Order thereon on April 20, 1984, and contradicts the contrary "assumption" and innuendo, caused by opposing counsel's misrepresentations, which this Court makes throughout its opinion.

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JAMES J. CLANCY
ATTORNEY AT LAW
9055 LA TUNA CANYON ROAD
SUN VALLEY, CALIF.
—
AREA CODE 213
352-2069

April 12, 1984

Mr. Dallas Holmes
Best, Best & Krieger
4200 Orange Street
Riverside, California 92502

RE: People of the State of California et al. v. The Book Store et al., No. 160755

Dear Dallas:

I am enclosing a copy of our motion to file an amendment to the pleadings in the Book Store case.

Diamond has stipulated to an order shortening time to set the motion for a hearing on Friday, April 20, 1984 and is being served today by mail. Judge Hennigan's office has indicated that we can get our order shortening time.

I do not anticipate any problems and believe that Judge Hennigan will grant our motion on the 20th. However, it may be well to have the City Council take specific action at its next meeting on April 18th to amend Resolution 83-102 by inserting after the word "ordered" on page 11, line 1, the words and phrases: "to commence a civil lawsuit naming as plaintiffs the City of Corona and People of the State of California, on the relation of the City Attorney of Corona, California, and".

Our Supplemental Memorandum in opposition to the motion to quash is being finalized and will be mailed to you tomorrow.

Sincerely,

James J. Clancy

JJC/cac
enclosure

EXHIBIT D

ORDER DUE
December 13, 1985

SUPREME COURT
FILED
NOV 20 1985
Lawrence P. Gill, Clerk
BY _____ DEPUTY

ORDER DENYING REHEARING

L.A. No. 32041

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

THE PEOPLE EX REL. CLANCY, ETC., ET AL.,
Petitioners

v.

THE SUPERIOR COURT OF THE COUNTY OF RIVERSIDE, Respondent;
EBEL ET AL., Real Parties in Interest

(AND COMPANION CASE)

Opinion modified.

Petition for rehearing DENIED.

Bird
Chief Justice

EXHIBIT E

ORIGINAL

4th Civil No E000934

IN THE SUPREME COURT OF THE

L.A. 32041

STATE OF CALIFORNIA

THE PEOPLE ex rel. CLANCY, as City Attorney, etc. et al.,
Appellants

vs.

SUPERIOR COURT OF THE STATE OF CALIFORIA FOR THE COUNTY OF RIVERSIDE,

Respondent,

THE "BOOK STORE", being a bookstore and motion picture arcade, located at 601 West Sixth Street, Corona, County of Riverside, California; HELEN E.EBEL; THOMAS CHARLES EBEL; EUGENE VAN ZEE; DOES 1 through 10, inclusive,

Real Parties In Interest)

4th Civil No. E000934

(Riverside County Superior Court No. 160755)

SUPREME COURT
FILED
DEC 20 1984
LAURENCE P. GILL, Clerk
Deputy

PETITION FOR HEARING BY REAL PARTIES IN INTEREST
AFTER DECISION BY COURT OF APPEAL,
FOURTH APPELLATE DISTRICT, DIVISION TWO, GRANTING WRIT OF MANDATE

(THE HONORABLE J. DAVID HENNIGAN, JUDGE PRESIDING)

ROGER JON DIAMOND
HECHT, DIAMOND & GREENFIELD
15415 Sunset Boulevard
Pacific Palisades, CA 90272
(213) 454-0621

Attorneys For Real Parties I
Interest

DECIDED 11-15 19
RE[illegible]D 19
HEARING DUE 1-14 19

IV. ARGUMENT

A. THE EMPLOYMENT OF A CITY ATTORNEY UNDER A CONTINGENCY FEE AGREEMENT TO PROSECUTE AN ADULT BOOKSTORE FOR THE PURPOSE OF CLOSING IT UNDER THE PUBLIC NUISANCE STATUTES VIOLATES THE PUBLIC POLICY OF THE STATE OF CALIFORNIA

A public attorney prosecuting a case in the name of the People of the State of California is similar to one who prosecutes criminal cases. This Court in People v. Superior Court (Greer), 19 Cal.3d 255, 266 (1977) stated:

> ". . . the prosecutor is a public official vested with considerable discretionary power to decide what crimes are to be charged and how they are to be prosecuted. . . . In all his activities his duties are conditioned by the fact that he is "the representative not of any 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. . . ."
>
> "Thus, not only is a judicial requirement of prosecutorial impartiality reconcilable with executive discretion in criminal cases, it is precisely because the prosecutor enjoys such broad discretion that the public

he serves and those he accuses may justifiably demand that he perform his functions with the highest degree of integrity and impartiality, and with the appearance thereof.

In People v. Superior Court (Greer), supra, this Court approved the trial court's order disqualifying the District Attorney because he would have been over zealous in pursuing the defendant because of a personal interest in the outcome of the case. More recently the California Court of Appeal in People v. Superior Court (Martin), 98 Cal.App.3d 515, 521 (1979), summarized the kind of "conflict of interest" which might justify the disqualification of a public prosecutor. The Court of Appeal noted that an emotional state or personal interest in the outcome of the case would be grounds for disqualification. In the instant case, Mr. Clancy not only has an obvious personal interest by virtue of his being an attorney for a Phoenix, Arizona organization that opposes adult material, he has a financial interest as well. The Ebels are aware of no case wherein a public official pursuing a case on behalf of a public entity or the People of the State of California was permitted to handle the case on a contingency fee basis.

In Price v. Caperton, 1 Duv. 207 (1864), the Court of Appeals of Kentucky held that a private attorney may be employed by the prosecutor to prosecute a criminal case. However, the Court also stated that the fee arrangement could not be contingent upon the outcome of the case. Specifically, the Court of Appeals stated,

". . . A contingent fee dependent on convic-

> tion ought never to be permitted to stimulate assistant counsel; and, so far, it might be the policy of the law to withhold its remedies for enforcing such a contract. . . ."

More recently the Supreme Court of New Mexico arrived at the same conclusion in Baca v. Padilla, 26 N.M. 223, 190 P.730 (1930). In this case the New Mexico Supreme Court held that it is contrary to public policy for an attorney to be employed on a contingency fee basis to secure a conviction. The New Mexico Supreme Court stated,

> ". . . The state provides a prosecuting attorney, pays him a salary, and no part of his compensation is dependent upon the conviction or acquittal of those charged with infractions of the state law. He is supposed to be a disinterested person, interested only in seeing that justice is administered and the guilty persons punished. To permit and sanction the appearance on behalf of the state of a private prosecutor, vitally interested personally in securing the conviction of the accused, not for the purpose of upholding the laws of the state, but in order that the private purse of the prosecutor may be fattened, is abhorrent to the sense of justice and would not, we believe, be tolerated by any Court."

Although the instant case is not strictly speaking a criminal

case it is quasi-criminal in nature. It is brought on behalf of the People of the State of California by either a district attorney or a city attorney. The same policy which prohibits a private attorney from prosecuting a criminal case on a contingent fee basis should prohibit a private attorney from prosecuting a quasi-criminal case on a contingency fee basis. A public attorney should be interested in justice and should not be motivated by personal gain. Indeed, this is apparently why Code of Civil Procedure Section 731 requires that this type of action be brought by a public official such as a district attorney or city attorney. This is not the same as a municipality simply hiring a private attorney to prosecute a lawsuit of a proprietary nature to recover funds. Under those circumstances it might be argued that a private attorney could be employed on a contingency fee basis. This case, however, is a governmental case not a proprietary case. The City of Corona and the People of the State of California are presumably functioning in a governmental manner and not in a proprietary manner.

The Court of Appeals stated in its opinion that the Ebels failed to identify any compelling interest at stake in this civil action to abate an adult bookstore which would require the same absolute neutrality on the part of a City Attorney which is involved in the prosecution of a criminal case. With all due respect to the Court of Appeal, the Ebels contend that their interest in preserving their First Amendment freedoms and in protecting their Fifth Amendment privilege against self incrimination are important interests. They should not be jeopardized by a private attorney motivated by a contingency fee agreement. Th

right of free speech is extremely important and is fundamental. In this particular case the contingency fee agreement has apparently led Mr. Clancy to attempt to attain relief which the courts of this state have specifically held is not available. In particular, Mr. Clancy seeks to close the Ebel's adult bookstore by establishing that the materials sold therein are obscene. Yet closure of the premises apparently is not an available remedy. See People Ex Rel Gow v. Mitchell Brothers Santa Ana Theater, 114 Cal.App.3d 923 (1981). Certainly the Fifth Amendment privilege against self incrimination is a fundamental interest affected by the prosecution of this action in the name of The People of the State of California. Indeed, Mr. Clancy does apparently have the power to secure immunity for the Ebels but has refused to do so. The presence of the Fifth Amendment self incrimination issue in this case certainly makes this case closer to a true criminal case than to a civil proceeding and requires this case to be analyzed more in the context of a criminal proceeding.

Even if this were viewed as strictly a civil case, which it is not, the contingency fee agreement herein with the "City Attorney" should not be permitted.

This Court recognized the special responsibility and duties of City Attorneys in City of Los Angeles v. Decker, 18 Cal.3d 860, 871 (1977) when the Court made the following comments in criticizing the conduct of a Deputy City Attorney at trial:

> ". . . Rule 7-105 of the Rules of Professional Conduct of the State Bar of California requires: "In presenting a

matter to a tribunal, a member of the State Bar shall: (1) Employ for the purpose of maintaining the causes confided to him such means only as are consistent with truth, and shall not seek to mislead the judge, judicial officer or jury by an artifice or false statement of fact or law." As suggested by the American Bar Association, a government lawyer may be under an even higher duty: "A government lawyer in a civil action . . . has the responsibility to seek justice and to develop a full and fair record, and he should not use his position or the economic power of the government to harass parties or to bring about unjust settlement of results." (ABA Code of Prof. Responsibility, canon 7, ethical consideration 7-14). Occupying a position analogous to a public prosecutor, his is "possessed. . . of important governmental powers that are pledged to the accomplishment of one objective only, that of impartial justice." (Professional Responsibility: Report of the Joint Conference (1958) 44 A.B.A.J. 1159, 1218)

(6) The duty of a government attorney in eminent domain action, which has been characterized as "a sober inquiry into

values, designed to strike a just balance between the economic interests of the public and those of the landowner" (Sacramento etc. Drainage Dist. v. Reed (1963) 215 Cal.App.2d 60, 69 [29 Cal. Rptr. 847]), is of high order. "The condemnor acts in a quasi-judicial capacity and should be encouraged to exercise his theory and practice of just compensation." (Hogan, Trial Techniques in Eminent Domain (1970) pp. 133, 135.)

The Decker case is important because it was a civil case involving the City of Los Angeles, not a criminal case. Even in a civil case this Court noted the special responsibility of public attorneys. In exercising a public function a city attorney may not have a personal interest in the outcome of the litigation. The Supreme Court of the United States has not permitted Mayors and Judges to have financial interests in the outcome of cases involving ordinance violations. See Ward v. Monroeville, 409 U.S. 57, 34 L.Ed.2d 267 (1972) and Tumey v. Ohio, 273 U.S. 510, 71 L.Ed. 749(1927).

The trial court has the inherent authority to disqualify attorneys in order to preserve the integrity of the proceedings. See Code of Civil Procedure Section 128 and William H. Raley Co. v. Superior Court, 149 Cal.App.3d 1042, 1048 (1983).

In conclusion, the issue discussed herein is one of first impression. There are no cases exactly on point although the policy of the State of California seems to prohibit the

utilization of contingency fee agreements by attorneys who are prosecuting cases in the name of the People of the State of California where fundamental rights are involved. For this reason this Honorable Court should grant a hearing to settle this important question of law.

B. UTILIZATION OF A SUBPOENA DUCES TECUM TO COMPEL THE PRODUCTION OF 262 ALLEGEDLY OBSCENE PUBLICATIONS VIOLATES THE FIFTH AMENDMENT PRIVILEGE AGAINST SELF INCRIMINATION UNLESS IMMUNITY IS GRANTED

Rule 29(a) of the California Rules of Court states that a hearing will be ordered where it appears necessary to secure uniformity of decision. In this particular case a hearing must be ordered to resolve the conflict between the decision below and the decision of the California Court of Appeal in People v. DeRenzy, 275 Cal.App.2d 380 (1969). The decision below is in direct conflict with the opinion in the DeRenzy case. For some strange reason the Court of Appeal below chose to ignore the DeRenzy opinion notwithstanding the fact that it was cited by the Ebels and extensively discussed in their Brief filed with the Court of Appeal. It is true that the language of the Court of Appeal in the DeRenzy case upon which the Ebels rely may be dictum. Nevertheless, the language is in the opinion and is directly contrary to the holding in the instant case.

People v. DeRenzy, 275 Cal.App.2d 380 (1969) involved a challenge to certain search warrants which were issued for the purpose of seizing an allegedly obscene motion picture film. The Court of Appeal upheld the search warrant and ruled the seizure to be valid. In discussing the propriety of seizing a motion pict

EXHIBIT F

LA32041

ORIGINAL

4th Civil No. E000934

ORIGINAL

IN THE SUPREME COURT OF THE

STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, on relation of the CITY ATTORNEY OF CORONA, CALIFORNIA; CITY OF CORONA, a municipal corporation, Petitioners, v. SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF RIVERSIDE, Respondent.	4th Civil No. E0000934 (Riverside County Superior Court No. 160755)
THE "BOOK STORE," being a bookstore and motion picture arcade, located at 601 West Sixth Street, Corona, County of Riverside, California; HELEN E. EBEL; THOMAS CHARLES EBEL; EUGENE VAN ZEE; DOES 1 through 10, inclusive, Real Parties in Interest.	

ADDITIONAL AUTHORITIES NOT CONTAINED
IN THE PAPERS AND BRIEFS ON FILE.

JAMES J. CLANCY
9055 La Tuna Canyon Road
Sun Valley, CA 91352
(818) 352-2069

Attorney for Petitioners
in Court of Appeal.

IN THE SUPREME COURT OF THE

STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, on relation of the CITY ATTORNEY OF CORONA, CALIFORNIA; CITY OF CORONA, a municipal corporation, Petitioners, v. SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF RIVERSIDE, Respondent.	4th Civil No. E0000934 (Riverside County Superior Court No. 160755)
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ADDITIONAL AUTHORITIES NOT CONTAINED
IN THE PAPERS AND BRIEFS ON FILE.

COME NOW the People of the State of California on relation of the City Attorney of Corona, California and the City of Corona, a municipal corporation, pursuant to this Court's instructions, to

file additional authorities not contained in the papers and brief on file in this case.

I

At lines 14-18 on page 7 of the Petition for Hearing, counsel for the Real Parties in Interest argues that because he has personal knowledge that in the past Mr. Clancy has represented "a Phoenix, Arizona organization that opposed adult material", such is a personal interest which is grounds for disqualification and prevents the City of Corona from contracting with Mr. Clancy to act as its attorney in the City's civil public nuisance abatement lawsuit against his client, the real party in interest herein. In opposition to that argument, People of the State of California, on the relation of the City Attorney of Corona, California and the City of Corona, a municipal corporation cite Sedelbauer v. State of Indiana, (Court of Appeals of Indiana, Third District, 1983) 455 N.E.2d 1159 at page 1164, reading:

> " . . ., Sedelbauer contends that allowing someone so opposed to pornographic materials to aid in prosecution is highly prejudicial and amounts to a deprivation of due process and equal protection of law. He fails to cite authority in support of this contention, nor does he demonstrate any actual prejudice in this regard. There is no indication that Mr. Taylor represented the State's interest outside of legal boundaries or inconsistent with the State's interest. Therefore, his argument on this issue must fail."

A copy of the Sedelbauer opinion is attached hereto as Exhibit 1 to these papers.

II

In the last paragraph on page 16 of the Petition for Hearing, counsel for the Real Parties in Interest cites U.S. v. Doe, ___

U.S. ___, 79 L.Ed.2d 552 (1984) as "the most recent U.S. Supreme Court decision on the subject and the one case which most closely resembles the instant case. . ." Further, after filing the Petition for Hearing, counsel for Real Parties in Interest, in a letter to the Clerk of the California Supreme Court dated January 28, 1985, called to this Court's attention the fact that in January, 1985, the U.S. Supreme Court had accepted U.S. v. Doe No. 84-823 for review.

In a letter dated February 4, 1985, counsel for People of the State of California, on the relation of the City Attorney of Corona, California, and the City of Corona, a municipal corporation, made the following reply:

> ". . . The reason given by Mr. Diamond for his January 28th communication was:
>
> > 'Because the case now pending before the California Supreme Court involves a related issue I thought the Court might wish to know that a related issue is now before the United States Supreme Court.' (my emphasis).
>
> " Mr. Diamond's characterization of U.S. v. Doe, No. 84-823 as involving a 'related issue' is inaccurate and misleading. This is the second time that U.S. v. Doe has been before the U.S. Supreme Court within the past year. The issue in U.S. v. Doe, which was alleged by Mr. Diamond to be 'related', was definitively decided by the United States Supreme Court when it first considered that case. See U.S. v. Doe, 79 L.Ed.2d 552 (1984). The Court of Appeal's decision below considered that issue and Mr. Diamond's contention that it was controlling and held it to be inapplicable ('unrelated') to the Corona facts.
>
> " The Corona Statement of Facts establish that the City of Corona's evidence which was subpoenaed: (1) was in existence, (2) was being offered for sale, and (3) was in the custody and control of the person who was served at the time the subpoena duces tecum was served. Further, proof on those elements was established by evidence aliunde. The Corona factual situation is unrelated to the facts in U.S. v. Doe which involve amorphous personal records which had not been authenticated by the U.S. Government by evidence aliunde.
>
> " Whether the first U.S. v. Doe decision presents a

'related' issue which is controlling, as alleged by Mr. Diamond and rejected by the Court of Appeal in its decision below, is already before the California Supreme Court and will be decided by that Court in its decision on that issue in the Petition for Hearing herein. The recent grant of certiorari in the second appeal in U.S. v. Doe on January 21, 1985 concerns matters relating to its first decision. Those issues do not have any further impact upon this Petition."

On the above matter, counsel for People of the State of California, on the relation of the City Attorney of Corona, California, and the City of Corona, a municipal corporation, wish to inform the Court that on April 1, 1985, the U.S. Supreme Court filed a memorandum order in No. 84-823, United States, Petitioner v. John Doe, No. 462, reading:

"April 1, 1985. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Fourth Circuit with instructions to dismiss the cause as moot."

A copy of the memorandum order, appearing as U.S. v. John Doe, No. 462, ___ U.S. ___, 85 L.Ed.2d 155, ___ S.Ct. ___, April 1, 1985, is attached hereto as Exhibit 2 to these papers.

DATED: June 10, 1985

Respectfully submitted,

JAMES J. CLANCY
Attorney for Petitioners
in Court of Appeal.

PROOF OF SERVICE

California Supreme Court

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

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

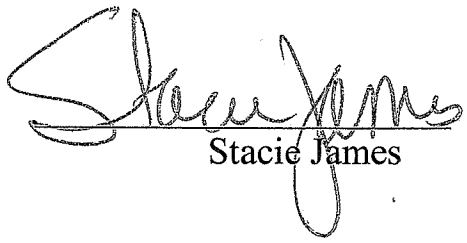
I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 777 South Figueroa Street, 44th Floor, Los Angeles, California 90017-5844. I am readily familiar with Arnold & Porter's practices for the service of documents.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

MOTION FOR JUDICIAL NOTICE BY REAL PARTIES IN INTEREST; DECLARATION OF SEAN MORRIS IN SUPPORT THEREOF

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

[SEE ATTACHED SERVICE LIST]

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



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S_____

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

[PROPOSED] ORDER GRANTING MOTION FOR JUDICIAL NOTICE BY REAL PARTIES IN INTEREST

The Motion for Judicial Notice by Real Parties in Interest is hereby GRANTED. The Court will take judicial notice of Exhibits A through F attached to the Motion.

Dated: _____, 2008 _____