

For Opinion See [188 P.3d 579](#)

Supreme Court of California.

COUNTY OF SANTA CLARA, County of Solano, County of Alameda, County of Los Angeles, County of Monterey, County of San Mateo, City and County of San Francisco, City of Oakland, City of San Diego and City of Los Angeles, Petitioners,

v.

SUPERIOR COURT OF SANTA CLARA COUNTY, Respondent,

Atlantic Richfield Company, et al., Real Parties in Interest.

No. S163681.

April 27, 2009.

From a Published Opinion Reversing an Order of the Superior Court Sixth Appellate District Case No. H031540, Santa Clara Superior Court Case No. CV 788657

Application for Leave to File Amici Curiae Brief and Proposed Amici Curiae Brief of Legal Ethics Professors Erwin Chemerinsky, Stephen Gillers, Nathaniel E. Gozansky, Matthew I. Hall, Carol M. Langford, Deborah L. Rhode, Mark L. Tuft, W. Bradley Wendel in Support of Petitioners

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***1 TO THE HONORABLE CHIEF JUSTICE:**

Pursuant to [Rule 8.520\(f\) of the California Rules of Court](#), the proposed *amici curiae* request permission to file the accompanying brief in support of Petitioners County of Santa Clara, et al. (the “Public Entities.”)

THE AMICI CURIAE

Erwin Chemerinsky is the Founding Dean of the University of California, Irvine School of Law. He has served on the faculties of Duke Law School, Gould School of Law, the University of Southern California, and DePaul College of Law. Professor Chemerinsky's areas of expertise include Constitutional law, federal practice, civil rights and civil liberties, appellate litigation and legal ethics. He taught legal ethics at USC for about 20 years. He is the author of six books on constitutional law and federal jurisdiction. He is also the author of more than 100 law review articles in journals such as the Harvard Law Review, Michigan Law Review, Northwestern Law Review, University of Pennsylvania Law Review, Stanford Law Review and Yale Law Journal and writes a regular column on the Supreme Court for California Lawyer, the Los Angeles Daily Journal and Trial Magazine, and is a frequent contributor to newspapers and other magazines. He regularly serves as a commentator on legal issues for national and local media. Dean Chemerinsky frequently argues appeals, including in the United States Supreme Court, the United States Courts of Appeals and this Court.

***2** Among his numerous awards, Dean Chemerinsky was named by Legal Affairs as one of “the top 20 legal thinkers in America,” April 2005 and was named by the Daily Journal every year from 1998-2003 as one of the 100 most influential lawyers in California. He received the Judge John Brown Award for Contributions to Federal Judicial

Education, 1998. He has also received awards for work on the Los Angeles City Charter from the American Society of Public Administration, the Los Angeles Chamber of Commerce and the Los Angeles Urban League, and served as chair of the mayor's Blue Ribbon Commission on City Contracting, which issued its report in February 2005. His prior legal practice includes work as a trial attorney for a private law firm and for the United States Department of Justice.

Stephen Gillers has been a Professor of Law at the New York University School of Law since 1978 and was Vice Dean from 1999-2004. He holds the Emily Kempin chair. He does most of his research and writing on the regulation of the legal profession and his courses include Regulation of Lawyers, Evidence, Media Law. Professor Gillers has written widely on legal and judicial ethics in law reviews and the legal and popular press. He has taught legal ethics as a visitor at other law schools and has spoken on lawyer regulatory issues in the U.S., Europe, and Asia -- often for legal ethics CLE credit -- including at federal and state judicial conferences, law firms and general counsel's offices, ABA *3 meetings, state bar meetings nationwide, before Congress, and in law school lectureships. Professor Gillers is the author of *Regulation of Lawyers: Problems of Law and Ethics*, a widely used law school casebook, first published by Little, Brown (now Aspen) in 1985 and now in its 8th edition (2009). With Roy Simon (and, as of 2009, also Andrew Perlman), he has edited *Regulation of Lawyers: Statutes and Standards*, published annually by Little, Brown, then Aspen, since 1989. He was chair of the Policy Implementation Committee of the ABA's Center for Professional Responsibility from 2004-2008 and remains a member. Following a clerkship with Chief Judge Gus J. Solomon in Federal District Court in Portland, Oregon, Professor Gillers practiced law for nine years in various settings in New York City before joining the NYU Law School faculty.

Nathaniel E. Gozansky joined the Emory law faculty in 1967. Since then, he has been a visiting professor at seven other law schools, including the University of San Francisco School of Law. Over the years, he has taught many courses in professional responsibility, including at USF. He served as associate dean for academic affairs at the law school from 1985 to 1989 and returned to that position in 1993, returning to his fulltime faculty position in 2002. Dean Gozansky's professional service during his tenure at Emory includes a stint as regional director of the Office of Legal Services in 1968, associate director of the Council on Legal Education Opportunity (CLEO) from 1970 to 1972, Board of Governors of the Society *4 of American Law Teachers from 1974 to 1977, and a hearing officer and arbitrator on both the federal and state levels. In addition, he has served as an accreditation inspector of more than twenty ABA-approved law schools since 1972.

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Carol M. Langford is a lawyer in the San Francisco Bay Area who specializes in giving advice on legal ethics and discipline to attorneys, judges, law firms and corporations, and in representing lawyers and law *5 students before the California State Bar in disciplinary and admissions matters. She serves as a national expert witness in the ethics area. She was formerly a partner in the Walnut Creek office of the international law firm of Carroll, Burdick & McDonough, where she was ethics advisor to the firm. Ms. Langford has co-written two books: a nationally adopted textbook entitled *Legal Ethics in the Practice of Law, 3rd Edition* (Lexis Law Publishing, 2007) and *The Moral Compass of the American Lawyer, Truth, Justice, Power and Greed* (Ballantine, 1999). In addition to her practice, she has served as the Chair and special advisor to the California State Bar Committee on Professional Responsibility and Conduct, and has taught ethics as an adjunct professor at the University of San Francisco School of Law since 1992 and the University of California, Hastings College of the Law. She has lectured and presented programs on ethics for the Cali-

ifornia State Bar, local bar associations, the Institute of Internal Auditors, PLI, University of San Francisco School of the Law, Hastings College of the Law, and Lawyer's Mutual Insurance Company. Ms. Langford was the ethics consultant to the Judicial Council of California, and is a member of the Ethics Officer's Association and the Mandatory Fee Arbitration Committee of the State Bar of California.

Deborah L. Rhode is an Ernest W. McFarland Professor of Law at Stanford Law School and is one of the nation's leading scholars in the fields of legal ethics and gender, law, and public policy. An author of 20 *6 books, including *Women and Leadership and Moral Leadership*, and a columnist for The National Law Journal, she is one of the most frequently cited scholars on legal ethics. She is the director of the Stanford Center on the Legal Profession, a former president of the Association of American Law Schools, and the founder and former director of Stanford's Center on Ethics. She also served as senior counsel to the Minority members of the U.S. House Committee on the Judiciary on presidential impeachment issues during the Clinton administration. She has received the American Bar Association's Michael Franck award for contributions to the field of professional responsibility; the American Bar Foundation's W.M. Keck Foundation Award for distinguished scholarship on legal ethics. Before joining the Stanford Law faculty, Professor Rhode was a law clerk for Supreme Court Justice Thurgood Marshall.

Mark L. Tuft is a partner with Cooper, White & Cooper LLP. His practice includes counseling and representing lawyers and law firms in professional responsibility and liability matters. Mr. Tuft is a co-author of the *California Practice Guild on Professional Responsibility* (The Rutter Group, a Thomson West subsidiary 2008). Mr. Tuft is currently a vice-chair of the California State Bar Commission on the Revision of the Rules of Professional Conduct. He is a former chair and special advisor to the California State Bar Committee on Professional Responsibility and Conduct. He has served on several State Bar commissions studying and *7 drafting rules of professional responsibility. Mr. Tuft teaches legal ethics as an adjunct professor at the University of San Francisco School of Law. He has served on the board of directors of the Bar Association of San Francisco and formerly chaired its ethics committee. He is currently a member of the ABA Center on Professional Responsibility and its editorial board and serves as a member of the board of directors of the Association of Professional Responsibility Lawyers. Mr. Tuft is also a member of the American Law Institute. He is a frequent lecturer and writer on professional responsibility issues and has received several awards, including the "Spirit of CEB" award, the Bar Association of San Francisco's Certificate of Merit award and USF Law School's adjunct professor of the year award. Mr. Tuft obtained his J.D. degree with honors from the University of California, Hastings College of the Law in 1968. He also received an LL.M. degree with highest honors from George Washington University in 1972.

W. Bradley Wendel is a Professor of Law at Cornell Law School. Prior to joining the faculty at Cornell he was an Assistant Professor and an Associate Professor of Law at Washington and Lee Law School. Before beginning full-time teaching in 1999, he was a product liability litigation associate at a large law firm in Seattle and a judicial clerk at the United States Court of Appeals for the Ninth Circuit. Professor Wendel's area of research and teaching specialization is legal ethics and professional *8 responsibility. He is the author of over twenty articles on legal ethics, as well as a textbook, *Professional Responsibility: Examples and Explanations*, published by Aspen Publishers and now in its second edition. In addition, he is joining as an editor for the fifth edition of Geoffrey C. Hazard, Jr., et. al., *The Law and Ethics of Lawyering* (Foundation Press), which is now in progress. Professor Wendel has been a permanent member of the drafting committee for the Multistate Professional Responsibility Exam (MPRE) since November 2007, having previously served as a visiting member of the committee.

STATEMENT OF INTEREST

This case concerns local government entities' ability to retain private counsel on a contingency-fee basis to assist in the pursuit of public nuisance actions. Such actions against large corporations or industries are intended to protect the public interest and could not and would not be pursued absent the local entities' ability to retain such counsel. The Real Parties in Interest, manufacturers of lead-based paint ("the manufacturers"), seek to extend the narrow holding in [*People ex rel. Clancy v. Superior Court* \(1985\) 39 Cal.3d 740](#), to create an inappropriate and impractical prohibition on this entire category of contingent-fee arrangements. However, such prohibitions are disfavored in the regulation of

attorneys and there are neither ethical nor structural barriers sufficient to justify the manufacturers' proposal.

***9** *Amici* ethics professors have strong interests in participating in making sure that only appropriate ethics limitations trammel the ability of lawyers to practice law or the ability of clients, such as public entities, to retain effective counsel in public interest cases. These *amici curiae* are familiar with the ethical and structural issues presented in this case and believe that there is a need for additional briefing on the issue so the Court can consider various, less-drastic options than a blanket prohibition on the retention of contingency fee counsel to support government entities in prosecuting public nuisance actions.

Amici curiae submit this brief to advance an argument that there are sufficient precautionary measures short of outright disqualification to ensure ethical and appropriate use of contingent-fee counsel under the supervision of government attorneys, without the risk of corruption or harm to the public trust. Accordingly, *amici curiae* respectfully request that leave be granted to allow the filing of the accompanying *amici curiae* brief.

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INTRODUCTION

The Real Parties in Interest, manufacturers of lead-based paint (“the manufacturers”), seek to extend the narrow holding of [People ex rel. Clancy v. Superior Court \(1985\) 39 Cal.3d 740](#) (hereinafter *Clancy*), to create an unnecessary

and impractical universal prohibition of contingent-fee arrangements between public entities and private lawyers who assist them with public nuisance cases. *Clancy* should not be so extended.

Essentially, the manufacturers ask the Court to decide, without case specific context, that possible ethical risks of using contingent-fee counsel, who are under the control and supervision of public lawyers and entities, are so great that the practice must be categorically forbidden. They seek this inappropriate bright line prohibition without consideration of the less severe precautionary measures available to prevent or mitigate any risk to public entity “neutrality.” Such a blanket prohibition would be contrary to the realities of contemporary legal practice, and would hamper public entities in bringing important lawsuits that benefit the public in these precarious environmental and economic times.

As Justice Bamattre-Manoukian points out in the concurring opinion in the Court of Appeal, the true concern as identified by the Court in *Clancy* is ensuring that the proper standard of neutrality can be maintained in light of the contingency fee agreement. Such neutrality can and should be assured on a case-by-case basis, taking into account such factors as the actual relationship between the public entity and its contingent-fee counsel and the type and status of the case at hand. Moreover, courts have ample authority to review and monitor the relationship between attorney and client to ensure that such neutrality is maintained.

The public entities in this case cannot afford to pay for years of litigation billed at private counsel's hourly rates. Disallowing public entities from ever engaging private counsel on a contingent-fee basis would effectively preclude them from bringing large-scale public nuisance cases, and thereby to promote public health and safety. Particularly in these days of economic distress and environmental concern, state and local government entities in general lack the resources to bring and sustain, over years of litigation, abatement actions against large corporate entities, such as the manufacturers defending this action.

In this brief, *amici curiae* outline some of the precautionary measures available to ensure that publicly desirable lawsuits such as this one can be managed on a contingent-fee basis without the risk of ethical violations, corruption or harm to the public trust.

ARGUMENT

I. IT IS NOT CATEGORICALLY UNETHICAL, DESTRUCTIVE OF NEUTRALITY, OR OTHERWISE AGAINST PUBLIC POLICY FOR PUBLIC ENTITIES TO RETAIN PRIVATE ATTORNEYS ON A CONTINGENT BASIS IN PUBLIC NUISANCE CASES.

The manufacturers urge a blanket prohibition on government entities' ability in public nuisance cases to retain private attorneys on a contingent-fee basis. (See, e.g., Opening Brief on the Merits of the Sherwin-Williams Company at 28 [“[P]ublic confidence in the fairness and justness of the legal system will be undermined if contingency fee counsel were permitted”]; *ibid.* [advocating the “need for a bright-line rule to preserve public trust and the appearance of impartial administration of justice”].) Such a prohibition is not required by legal ethics, would not serve the public interest and would not be aligned with the types of fee agreements typical in today's legal market.

The inevitable consequence of imposing a blanket no contingent-fee agreement rule, therefore, will be that many public nuisances will go unabated. Much less draconian measures are available to assure neutrality and ethical behavior.

A. The Public Interest in the Bringing of Public Nuisance Actions Weighs Heavily in Favor of Adopting Less Drastic Solutions.

The public entities in this case have demonstrated that they are unable to litigate this case without the assistance of

specialized counsel, retained on a contingent basis. (See, e.g., Petitioners' Appendix, Volume 2, Exhibit 10 [Declaration of Deputy County Counsel of the County of Alameda in Opposition to Defendants' Motion to Bar Payment of Contingent Fees to Private Attorneys] at ¶¶ 8-9 ["Under these circumstances, this Office does not have sufficient staff or resources to directly handle on its own all aspects of all litigation and legal matters involving the County."]; Petitioners' Appendix, Volume 2, Exhibit 12 [Declaration of Ann Miller Ravel in Support of Opposition to Defendants' Motion to Bar Payment of Contingent Fees to Private Attorneys (County of Santa Clara)] at ¶¶ 9-10 [same].) Indeed, it is widely recognized "that contingent fees are an important mechanism for providing access to the courts by plaintiffs with legitimate claims." (Jay, *The Dilemmas of Attorney Contingent Fees* (1989) 2 *Geo. J. Legal Ethics* 813; see also State Bar of Cal. Standing Committee on Professional Responsibility and Conduct, Formal Opinion 1987-94 ["Since the interests of the public are better served by allowing contingency fee agreements, they have been deemed to be generically beyond the reach of our conflicts of interest rules."].)

B. This Court's Decision in *Clancy* Does Not Mandate an Absolute Ban on Contingent-Fee Arrangements in Public Nuisance Cases, Nor Should It Be So Extended.

In *Clancy*, the City of Corona enacted two ordinances restricting the sale of "sex oriented material" aimed at shutting down a specific adult bookstore. (*Clancy, supra*, 39 Cal.3d at 743.) After the ordinances were enjoined as unconstitutionally infringing on the store owner's First Amendment Rights, the city enacted an ordinance defining as a public nuisance, "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...." (*Ibid.*) The city also retained Clancy, a private attorney, to abate nuisances under the ordinance. (*Ibid.*) When the ordinance passed, the police department investigated the business, and the city declared it to be a public nuisance and revoked its business license. (*Id.* at 743-44.) Clancy filed a complaint as the city's "special attorney" against the shop, its owner and other individuals, seeking abatement of a public nuisance, declaratory judgment and an injunction. (*Id.* at 744.)

The retainer agreement between the city and Clancy provided that he would 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.

(*Id.* at 745.) This Court "[held] the arrangement inappropriate under the circumstances." (*Id.* at 743.) Noting that Clancy's "hourly rate will double if the City is successful in [its] litigation," the Court found that "this arrangement gives him an interest extraneous to his official function in the actions he prosecutes on behalf of the City." (*Id.* at 747-48.)

The Court noted, "[T]here is a class of civil actions that demands the representative of the government to be absolutely neutral" and observed that "[t]his requirement precludes the use in such cases of a contingent fee arrangement." (*Id.* at 748.) Eminent domain actions were discussed as cases in which a government attorney occupies a "position analogous to a public prosecutor," and therefore cannot be retained on a contingency fee basis. (*Id.* at 748-49.)

The Court observed that "[s]imilarly, the abatement of a public nuisance involves a balancing of interests" between "the interest of the people in ridding their city of an obnoxious or dangerous condition" and "the interest of the landowner in using his property as he wishes." (*Id.* at 749.) Significantly, the Court determined that this balancing of interests is of heightened importance "when an establishment such as an adult bookstore is the subject of an abatement action [because] not only does the landowner have a First Amendment interest in selling protected material, but the public has a First Amendment interest in having such material available for purchase." (*Ibid.*) Therefore, the Court held "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." (*Id.* at 750.)

The manufacturers contend that the *Clancy* Court's reference to "absolute neutrality" mandates an absolute prohibition on a local government's retention of contingency fee counsel in any public nuisance abatement case. However, *Clancy* requires no such bright line rule, nor does the nature of public nuisance cases

This case and the retainer arrangements in it are markedly different from those in *Clancy*. Here, unlike in *Clancy*, there has been no police involvement. Moreover, neither the public's nor the manufacturers' First Amendment rights are implicated by the action.

Also in *Clancy*, the contingent-fee attorney was acting almost like a special prosecutor. That is not the case here. A traditional justification for prohibiting prosecutors from working on contingency concerns the maxim that prosecutors, who are quasi-judicial officers, may not be paid on the basis of the results that they secure. "Prosecutors are subject to constraints and responsibilities that don't apply to other lawyers." (*United States v. Kojayan* (9th Cir. 1993) 8 F.3d 1315, 1323, citing *Berger v. United States* (1935) 295 U.S. 78, 88.) This is a function, among other things, of constitutional due process. (See *Kojayan, supra*, 8 F.3d at 1323, citing *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 648-49 [dis. opn. of Douglas, J.].) The same due process constraints do not apply to lawyers hired to bring civil lawsuits. Prosecutors are different from plaintiff's civil litigators.

C. Outright Prohibitions Are Unusual and Disfavored.

Blanket prohibitions on retainer arrangements with lawyers are both rare and disfavored. In deciding whether counsel for a party are disqualified, a balancing must occur between a party's right to counsel of choice, an attorney's interest in representing a client, the financial burden on a client of replacing disqualified counsel and any tactical abuse underlying a disqualification proceeding against the fundamental principle that the fair resolution of disputes within our adversary system requires vigorous representation of parties by independent counsel unencumbered by conflicts of interests.

(*Med-Trans Corp., Inc. v. City of California City* (2007) 156 Cal.App.4th 655, 663-64; see also *People ex rel. Dept. of Corporations v. SpeeDee Oil Change Systems, Inc.* (1999) 20 Cal.4th 1135, 1144-45.)

Even where a present conflict of interest exists, neither the California Rules of Professional Conduct nor the American Bar Association's Model Rules of Professional Conduct absolutely prohibits representation. (See Rule 3-310 of the California State Bar Rules of Professional Conduct; ABA Model Rules of Prof. Conduct, Rule 1.7(b); see also Vapnek et al., Cal. Practice Guide: Professional Responsibility (2008) §§ 4.72-4.85 [discussing the situations in which a client can consent to representation by an attorney with an actual conflict of interest].)

There are very few instances in which the law categorically prohibits attorneys from professional activities. (See, e.g., Rule 5-210 of the California State Bar Rules of Professional Conduct [prohibiting an attorney from acting as an advocate and witness in the same proceeding; however, there are narrow exceptions to this "prohibition"]; ABA Model Rules of Prof. Conduct, Rule 1.5 [prohibiting the engagement of counsel on a contingency fee basis in criminal proceedings and divorce proceedings where the fee payment is dependent upon securing a divorce or property settlement].) Prohibitions on entering into contingent-fee arrangements are strictly limited to circumstances in which the "dangers [of contingent fee arrangements] are thought to outweigh their benefits." (Restatement Third of the Law Governing Lawyers (5th ed. 2008), section 35, comment b.)

Even in those areas where engagement of contingency fee counsel are restricted pursuant to public policy, California courts conduct a case-specific analysis to determine how those policy concerns impact the fee agreement at issue. Historically, contingent fee agreements were prohibited in the area of marital dissolution cases, where the courts enforce the strong public policy in preserving marriages. (See, e.g., *Parsons v. Segno* (1921) 187 Cal. 260, 261 ["[T] this contract was void as against public policy, being a contract for a contingent fee in a divorce action."].) However,

this Court has long recognized case-by-case exceptions to the rule. For example, in [Coviello v. State Bar \(1955\) 45 Cal.2d 57, 60-61](#), this Court held that the usual public policy interest in preserving the institution of marriage did not prohibit a contingent-fee agreement to obtain a judgment *10 of dissolution because the bigamous marriage at issue was not valid as a matter of law. Similarly, there are a variety of other situations in which contingent-fee arrangements in the divorce context have been found not to violate public policy. (See also Vapnek et al., Cal. Practice Guide: Professional Responsibility, *supra*, §§ 5:114-117 [discussing the situations in which retention of contingent-fee counsel in dissolution proceedings does not violate public policy, the factors to be considered in evaluating such agreements and measures an attorney can take to ensure the propriety of the agreement]; State Bar of Cal. Standing Committee on Professional Responsibility and Conduct, Formal Opinion 1983-72 [same].)

D. “Pure” Billable Hour or Contingent-Fee Arrangements Are Becoming the Exception, Rather Than the Rule.

The blanket prohibition urged by the manufacturers rests on an increasingly false dichotomy between pure strict hourly fee agreements and purely contingent representation. In addition to pure hourly fee agreements and pure contingent-fee agreements, there is a whole range of types of more frequently utilized fee agreements combining elements of the two. The broad range of fee agreements common in today's legal market is not conducive to one-size-fits-all, across-the-board prohibitions or rules.

The California Rules of Professional Responsibility and the ABA Model Rules of Professional Conduct both recognize that whether or not an attorney's fee is permissible is based on numerous factors, not just the fact *11 of contingent risk or the lawyer's hourly rate. (See Rule 4-200 of the California State Bar Rules of Prof. Conduct [prohibiting only the charging of “illegal or unconscionable fees”].)

Among the factors to be considered, where appropriate, in determining the conscionability of a fee are the following:

- (1) The amount of the fee in proportion to the value of the services performed.
- (2) The relative sophistication of the [lawyer] and the client.
- (3) The novelty and difficulty of the questions involved and the skill requisite to perform the legal service properly.
- (4) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the [lawyer].
- (5) The amount involved and the results obtained.
- (6) The time limitations imposed by the client or by the circumstances.
- (7) The nature and length of the professional relationship with the client.
- (8) The experience, reputation, and ability of the [lawyer] performing the services.
- (9) Whether the fee is fixed or contingent.
- (10) The time and labor required.
- (11) The informed consent of the client to the fee.

*12 (*Id.* at 4-200(B).)^[FN1]

FN1. (See also ABA Model Rules of Professional Conduct, Rule 1.5(a) [prohibiting only “unreasonable” fees, as determined by reference to: (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly; (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer; (3) the fee customarily charged in the locality for similar legal services; (4) the amount involved and the results obtained; (5) the time limitations imposed by the client or by the circumstances; (6) the nature and length of the professional relationship with the client; (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and (8) whether the fee is fixed or contingent].)

Moreover, lawyers and clients in many legal markets have moved toward greater use of “hybrid” fee arrangements possessing some, but not all, of the characteristics of purely contingent representation. One common way of creating a hybrid fee arrangement is to incorporate one or more of the above factors, including contingent risk, in conjunction

with an agreement for hourly rates.

“Some of the more typical alternative-fee arrangements include flat fees per case, project or a packaged group of similar cases ... Law firms can [also] offer a fixed rate on a deal and top it with a success ‘kicker.’” (Heller, *General Counsel Pressuring Firms Amid Recession*, Nat. L.J. (Apr. 6, 2009) available at <http://www.law.com/jsp/ihc/PubArticleIHC.jsp?id=1202429666843&thePage=2>.)

What has been a slow and steady call by many corporations, in-house counsel and legal think tanks to law firms to *13 abandon the billable hour in favor of alternative fee arrangements has turned into a loud drumbeat in the ?? year, as the economy heads south. Many law firms are now offering clients an array of alternative fee arrangements, including flat fees, success fees, contingency fees and retainers. Even some large law firms, which have clung to the billable hour, are bowing to pressure from economically challenged clients and agreeing to other types of fees.

(Kay, *Billing Gets Creative in Souring Economy*, Nat. L.J. (Nov. 11, 2008) available at <http://www.law.com/jsp/ihc/PubArticleIHC.jsp?id=1202425927179>. See also Glater, *Law Firms Feel Strain of Layoffs and Cutbacks*, N.Y. Times (Nov. 11, 2008), available at http://www.nytimes.com/2008/11/12/business/12law.html?_r=2&emc=etal [discussing increased client demands for flat fees or fixed fees, or success fees; “Now that firms are increasingly desperate for business, some corporate general counsels say, the firms are more willing to accept less profitable payment arrangements that do not reward the firms for simply assigning more lawyers to spend more time on a project.”]; Elinson, *Are Big Firms Warming Up to Alternative Fee Deals?*, The Recorder, (July 11, 2007), available at <http://www.law.com/jsp/article.jsp?id=900005556182> [discussing increasing use of performance-based arrangements, including “hybrid contingency”].)

***14 E. The Incentives In Contingent-Fee Contracts Are Not Unique to, or Especially Pronounced in, the Contingent-Fee Arena.**

The incentive to attorney Clancy's overzealously prosecuting nuisance actions is much greater than those in this case. Under Clancy's fee agreement, he was paid hourly whether he won or lost a case, but he was paid at a higher rate for achieving a favorable result. This type of arrangement provides incentive to over-litigate a case to its conclusion or even to churn the matter in order to maximize the hourly fee. By contrast, the contingency-fee attorneys in these cases will be paid nothing if they are not successful. They would have little incentive to pursue the case if it was not meritorious or in the public's best interest.

Many of the risks of unethical behavior by contingent-fee counsel in the type of cases cited by the manufacturers apply equally or even more strongly to counsel paid on an hourly basis. For example, the manufacturers suggest that there is a risk that a contingent-fee lawyer might pursue a claim even when the public interest would be served best by settlement in order to gain the opportunity of a potentially greater recovery. (See, e.g., Reply Brief on the Merits of the Sherwin-Williams Company at 28; Reply Brief on the Merits of Atlantic Richfield Company at 6-7.) However, contingent-fee agreements frequently provide less incentive to prolong litigation than hourly fee agreements. Contingent-fee agreements “give lawyers an additional incentive ... to encourage only those clients *15 with claims having a substantial likelihood of succeeding.” (Restatement Third of the Law Governing Lawyers, section 35, comment (b). See also Kriendler, *The Contingent Fee: Whose Interests Are Actually Being Served?* (1979) 14 Forum 406 [“The contingent fee serves the interests of society because it encourages efficiency, economy and speed.”].)

Many commentators believe that an attorney paid on an hourly basis has an even greater incentive to continue to pursue a claim, regardless of whether it was meritorious or not or could have been settled or resolved at an earlier date, because continued work in fact would result in a larger fee. In the billable-hour context, “the fee borne by the client will [often] bear no relationship (other than, perhaps, an entirely fortuitous one) to the value of the legal work delivered because the fee is determined solely by reference to the amount of time devoted to the work. The efficiency or inefficiency of the lawyer(s) whose work is covered by the fee will have a greater impact on the size of the fee than the value that the work bears to the client's need.” (Sager and Lauer, *The Billable Hour: Putting a Wedge Between Client*

and Counsel (2003) L. Prac. Today, available at <http://www.abanet.org/lpm/lpt/articles/finl2032.html>. See also Turrow, *The Billable Hour Must Die*, ABA Journal (August 2007), available at http://www.abajournal.com/magazine/the_billable_hour_must_die/ [on its face, billable hour system rewards “slow problem-solving, duplication of effort, featherbedding the workforce and compulsiveness -- not to mention *16 fuzzy math”; hourly billing translates to a system “in which the frank economic incentives favor prolonging rather than shortening the litigation”]; Fortney, *The Billable Hours Derby: Empirical Data on the Problems and Pressure Points (2005-06)* 33 *Fordham Urb. L. J.* 171, 189 [“[S]ome general counsel recognize that the nature of billable hours practice may drive up the costs of legal services because the billable hours fee structure rewards inefficiency. As explained by a law firm consultant, ‘Rates don’t drive costs, [inefficient] staffing does.’”] [modification in original, footnotes omitted].)

It makes no sense to throw the baby out with the bathwater in an overzealous absolute prohibition of public entity retention of private counsel on a contingent-fee basis. Instead, the courts should, examine such fee agreements and cases on a case-by-case basis to determine whether neutrality has been maintained. Just as there are many types of contingency fee agreements, there are many types of public nuisance actions. Moreover, where there is a showing of potential bias or unethical conduct, courts have the authority and discretion to rely on less draconian measures, such as those proposed in Section II below, to ensure government attorneys retain and exercise all necessary power so that the litigation proceeds in the manner best suited to protect the public interest.

***17 II. THERE ARE MANY AVAILABLE MEASURES SHORT OF ABSOLUTE PROHIBITION OF CONTINGENT-FEE ARRANGEMENTS TO PREVENT OR MITIGATE ETHICAL MISDEEDS OR OTHER HARM.**

California courts have more than adequate tools to assure that private contingent-fee counsel and their public entity clients maintain proper neutrality and that the private contingent-fee attorneys are appropriately supervised and controlled by the public entities that hire them. Depending on the fee agreements, the type of case, the capacity of the parties and whether there has been a showing of potential misconduct or unethical behavior, courts can determine the level of supervision necessary to ensure neutrality and exercise various types of controls such as those discussed below.

Absent a showing of some likelihood of unethical conduct or lack of neutrality, the court need not expend further resources in actively supervising or monitoring the relationship between attorney and client. However, if a defendant makes a prima facie showing of unethical conduct or lack of neutrality, courts can turn to the measures described herein to evaluate the relationship between the parties and to ensure neutrality.

A. This Court Can Direct that Public Entity Contingent-Fee Agreements Expressly Reserve Ultimate Control of the Litigation to the Public Entity and/or Its Public Attorneys.

As Justice Bamattre-Manoukian observed in the Court of Appeal proceedings, courts have the “inherent power to review contingency fee *18 agreements [citation], which will allow the trial court to oversee the propriety of the contingency fee agreements in this case throughout the course of the litigation.” (*County of Santa Clara, v. Superior Court* (2008) 74 Cal.Rptr.3d 842, 854 [conc. opn. of Bamattre-Manoukian, J.], review granted July 23, 2008. This inherent power, fully recognized in analogous case law, presents a model in which California courts could be advised, where necessary, to examine the actual fee agreements between the public entities and their contingency fee private counsel, the particular facts of the case and the actual conduct of the public entity, the public lawyers, and the private contingent-fee attorneys to determine whether the contingent-fee agreement is appropriate. (*Id.* at 862.) Just as the Court in *Clancy* conducted a factual inquiry into the fee agreement, the circumstances of the case and the conduct of counsel, the concurrence proposes a fact-based case-by-case analysis. (*Id.* at 860.)

This Court can authorize the California courts to require that a government attorney be among the counsel of record.

Such an appearance gives the government attorney a responsibility to the court. (See, e.g., [1 Witkin Cal. Procedure \(5th ed. 2008\) Attorneys § 4, p. 39](#) [“[A]n attorney, as a person licensed to practice law, is considered an ‘officer of the court,’ with certain public duties and responsibilities incident to that status.”]; ABA Model Rules of Prof. Conduct, Rule 3.3 [attorney owes a duty of candor to the tribunal]).

***19** In cases such as this one, where large and sophisticated public entities hire contingent-fee counsel to assist them in litigating large-scale public nuisance cases, it is enough that through its public lawyers the public entity remains substantively involved in the case and retains control of the case perhaps as co-lead or lead counsel. Attorneys are presumed to act ethically, and there is no reason to doubt that contingent-fee counsel, working alongside government counsel will not do so in this context. Of course such involvement does not require the public entity to be present at every deposition or to review every document produced. Public entities and their contingent-fee counsel should be able to divide work among themselves just as co-counsel do in any other situation.

If a public entity has no publicly employed and paid attorneys, or those lawyers lack the capacity or resources to be active in the case or to act as co-lead or lead counsel, and defendants make a showing of a need for greater supervision, the court assigned the case has ample additional tools to assure neutrality and ethical behavior on a case-by-case basis. (See Measures Discussed at Pages 20-30 below.) And even in these instances one size does not necessarily fit all cases.

As Justice Bamattre-Manoukian notes, all of the Public Entities in this case have maintained complete control over the litigation and this control is set out in several of the fee agreements. ([County of Santa Clara, supra, 74 Cal.Rptr.3d at 861.](#)) (See also Petitioners' Appendix Volume 2, ***20** Exhibit 7 at 34-44, 242-269, 283-287, 289-300, 302-307, 363-364; Volume 2, Exhibit 10 at 414-424; Volume 2, Exhibit 12 at 433-446; Volume 2 Exhibit 16 at 462-473 [Retainer Agreements as submitted to the Superior Court and the Court of Appeal].)

B. California Courts Are Authorized to Examine Contingency Fee Agreements at the Outset of the Litigation to Assure that They Create No Risk to the Public Interest or Raise Any Ethical Issues.

The manufacturers contend that any inquiry by California courts into the terms and performance of contingent agreements would be impractical and unduly burdensome. In fact, courts are well situated to conduct this type of examination. When necessary, courts employ numerous mechanisms for ensuring that fee agreements of all types are fair and ethical, and that the terms of an agreement between lawyers promote the public interest.

If parties opposing public entities make a case-specific proper showing of need or concern, courts are empowered to review the retainer agreements *in camera* to determine that such language exists and is adequate. (See, e.g., [Roa, supra, 37 Cal.3d at 933](#) [recognizing the “court's inherent power to review attorney fee contracts and to prevent overreaching and unfairness.”]; see also [Jackson v. United States \(9th Cir. 1989\) 881 F.2d 707, 710](#) [“[A]ll courts possess an inherent power to prevent unprofessional conduct by those attorneys who are practicing before them. ***21** This authority extends to *any* unprofessional conduct, including conduct that involves the exaction of illegal fees.”] [footnote omitted] [emphasis in original]; [Cooper v. Singer \(10th Cir. 1983\) 719 F.2d 1496, 1505](#), [en banc], overruled in part on other grounds, [Venegas v. Mitchell \(1990\) 495 U.S. 82](#) [“[f]ees are central to [the attorney-client relationship],” over which courts retain supervisory power, “and contingent fee arrangements are therefore subject to the court's supervision”]; [Dunn v. H.K. Porter Co. \(3rd Cir. 1979\) 602 F.2d 1105, 1108](#) [“courts have the power to monitor [contingency fee agreements] either through rule-making or on an ad hoc basis”]; [Schlesinger v. Teitelbaum \(3rd Cir. 1973\) 475 F.2d 137, 141](#) [“in its supervisory power over the members of its bar, a court has jurisdiction of certain activities of such members, including the charges of contingent fees”]; [King v. Fox, \(N.Y. 2006\) 851 N.E.2d 1184, 1191-92](#) [reviewing the conscionability of a contingency fee agreement]; Rule 4-200 of the California State Bar Rules of Prof. Conduct [forbidding an attorney from entering “into an agreement for, charg[ing] or collect[ing] an illegal or unconscionable fee”]; ABA Model Code Prof. Responsibility, Canon 13 (1908) [“A contract for a contingent fee ... should always be subject to the supervision of a Court, as to its reasonableness.”].)

To ensure that public attorneys exercise real rather than illusory control over contingent-fee counsel, courts can require that the retainer agreements providing for contingent-fee retention specify the types of *22 information and litigation decisions contingency fee counsel must present to the government attorneys for decision. Courts could also require that the retainer agreements fully recognize the private attorneys' duty to keep government attorneys informed of the status of the litigation above and beyond what already exists in ethics rules. (See, e.g., Rule 3-500 of the California State Bar Rules of Prof. Conduct.) Similarly, the agreements can make it clear that the defendants may contact the government attorneys directly, without having to confer with contingent-fee counsel. (Cf. ABA Standing Committee on Ethics and Professional Responsibility, Formal Opinion 06-433 [“Model Rule of Professional Conduct 4.2 generally does not prohibit a lawyer who represents a client in a matter involving an organization from communicating with the organization's inside counsel about the subject of the representation without obtaining the prior consent of the entity's outside counsel.”]; D.C. Bar Ethics Opinion 331 [same].)

The Restatement of the Law Governing Lawyers succinctly states both the general rule and the exception applicable here. “Many client-lawyer fee arrangements operate entirely without official scrutiny. A client-lawyer fee arrangement will be set aside when its provisions are unreasonable as to the client.” (Restatement Third of the Law Governing Lawyers, section 34, comment (b), citing [Restatement Second of Contracts, section 208](#) [unconscionable contracts].)

***23 C. Where Necessary, California Courts Can Conduct Ongoing Examination of the Status of Public Nuisance Cases to Assure No Harm to the Public Interest or Ethical Violations.**

To the extent necessary in a given case, the courts can require a public entity's private and public counsel periodically to check in, *ex parte*, with respect to how the litigation is being managed to determine whether an improper level of discretion has been afforded to or exercised by private counsel.

Courts often make judgments about the actual relationships between counsel and their clients throughout the litigation of a lawsuit. (See, e.g., Fed. Jud. Council, Manual for Complex Litigation, Fourth (2004) §§ 14.211-14.214 [providing guidelines for court involvement in selecting counsel, establishing fee guidelines, and mandating submission for periodic reports in complex class actions].) In the context of public nuisance cases, this Court could explicitly authorize such monitoring of the relationship between the government entities and their public lawyers and their private contingency fee counsel where necessary. After all, California courts already possess the power to disqualify attorneys, which “derives from the power inherent in every court ‘[t]o control in furtherance of justice, the conduct of its ministerial officers, and of all other persons in any manner connected with a judicial proceeding before it, in every matter pertaining *24 thereto.’ ” (*In re Complex Asbestos Litig.* (1991) 232 Cal.App.3d 572, 585, quoting [Code Civ. Proc. § 128](#), subd. (a)(5).)

Another opportunity for oversight surely comes at the settlement phase of a case. The Court assigned to the case can, as necessary, assure itself that the public entity exercises appropriate oversight in authorizing or directing settlement. (See [Levy v. Superior Court](#) (1995) 10 Cal.4th 578, 583, citing [Blanton v. Womancare, Inc.](#) (1985) 38 Cal.3d 396, 404; [Whittier Union High Sch. Dist. v. Superior Court](#) (1977) 66 Cal.App.3d 504, 508 [“[T]he law is well settled that an attorney must be specifically authorized to settle and compromise a claim, that merely on the basis of his employment he has no implied or ostensible authority to bind his client to a compromise settlement of pending litigation”]; State Bar of Cal. Standing Committee on Professional Responsibility and Conduct, Formal Opinion 1989-111 [“[W]ithout the express consent of a client, an attorney cannot enter into a settlement agreement (see [Bambic v. State Bar](#) (1985) 40 Cal.3d 314; [Sampson v. State Bar](#) (1974) 12 Cal.3d 70; [Bodisco v. State Bar](#) (1962) 58 Cal.2d 495; Los Angeles County Bar Association Ethics Opinion No. 441 (1987))”].)

There is, however, no reason to presume that the contrary will occur, as the manufacturers suggested. (See, e.g., Opening Brief on the Merits of the Sherwin-Williams Company at 33 [implying that the government entities have not retained control].)

*25 In addition, the courts have an opportunity further to assess appropriate issues if such a case goes to judgment. At that time, likely the court will be assessing a statutory fee claim using criteria similar to those in the California Rules of Professional Conduct discussed above at page 11. (See, e.g., [Ketchum v. Moses \(2001\) 24 Cal. 4th 1122, 1132](#) [looking to “(1) the novelty and difficulty of the questions involved, (2) the skill displayed in presenting them, (3) the extent to which the nature of the litigation precluded other employment by the attorneys, (4) the contingent nature of the fee award” in determining the reasonableness of a lodestar fee award]; [Kerr v. Screen Extras Guild, Inc. \(9th Cir. 1975\) 526 F.2d 67, 70](#) [looking to “(1) the time and labor required, (2) the novelty and difficulty of the questions involved, (3) the skill requisite to perform the legal service properly, (4) the preclusion of other employment by the attorney due to acceptance of the case, (5) the customary fee, (6) whether the fee is fixed or contingent, (7) time limitations imposed by the client or the circumstances, (8) the amount involved and the results obtained, (9) the experience, reputation, and ability of the attorneys, (10) the ‘undesirability’ of the case, (11) the nature and length of the professional relationship with the client, and (12) awards in similar cases” to determine the reasonableness of a lodestar fee award].) Similar court oversight exists if a percent of common fund attorneys fee is claimed or to be paid. (Cf. *26 [Cundiff v. Verizon Cal., Inc. \(2008\) 167 Cal.App.4th 718, 724](#); [Lealao v. Beneficial Cal, Inc. \(2000\) 82 Cal.App.4th 19, 45-46.](#))

The manufacturers repeatedly argue in the abstract for their bright line preclusion of contingent-fee agreements because (according to them) all public nuisance actions are akin to, and can, in some situations, trigger criminal prosecutions. (See, e.g., Opening Brief on the Merits of the Sherwin-Williams Company at 17-19, 26; Opening Brief on the Merits of Atlantic Richfield Company at 24-25; Reply Brief on the Merits of the Sherwin-Williams Company at 24.) However, public nuisance actions vary widely, and the instant case is not one in which criminal prosecution is likely or anticipated. That risk does not exist here. (See, e.g., Public Entity Plaintiffs' Answering Brief at 17 [noting that the “statute of limitations for criminal liability against [the manufacturers] has long since run” and “in the eight years that this case has been pending, there has been no hint of criminal proceedings or liability, no involvement by the police, and nothing to suggest prosecution in the future”].)

Moreover, the California courts can make sure that public nuisance lawsuits that mutate into or even move toward public prosecutions require re-examination of the retainer agreements between the public entities and the private lawyers. (See, e.g., [Roa v. Lodi Medical Group, Inc. \(1985\) 37 Cal.3d 920, 933](#) [recognizing the “court's inherent power to review attorney fee contracts and to prevent overreaching and unfairness”].) And any *27 criminal actions that succeed to a civil public nuisance lawsuit can be carved out and managed either directly by the public prosecutors or, if possible, handled on a non-contingent-fee basis by private lawyers acting as special prosecutors.

D. Upon an Appropriate Showing by Opposing Counsel, a Court May Always Conduct a Hearing to Determine the Propriety of Counsel's Behavior.

Perhaps because there is no evidence in this case to suggest that the public entities have improperly delegated their discretionary decision making powers to contingency fee counsel or that the public entities or their private contingency fee counsel are acting in any manner other than in the best interest of the public, as required by the law, the manufacturers argue that it is inappropriate to place the burden of a *prima facie* showing on the parties defending public nuisance actions. (See, e.g., Reply Brief on the Merits of the Atlantic Richfield Company at 4 [characterizing Plaintiffs' argument “that a defendant must establish that the contingent fee attorney has engaged in an ethical violation” as incorrect]; *id.* at 5 [“There is no need for a defendant to proffer ‘specific evidence of misconduct.’”].)

However, courts presume that attorneys act ethically in the best interests of their clients. Courts inquire about the circumstances of representation only when there is reason to believe otherwise. (See, e.g., Public Entity Plaintiffs' Answering Brief, at 34 [“California courts presume that attorneys will behave ethically. [Citations] This presumption applies *28 to all attorneys, regardless of whether they are acting on an hourly, contingent, or pro bono basis.”].) If a court or opposing party legitimately is concerned that the government entities have improperly delegated discretionary decision-making to contingency fee counsel, the court may conduct or the party may request a hearing at which both parties can present evidence and argument regarding the contingency fee counsel's role and conduct.

For example, both California and federal courts have formulated methods for determining whether attorneys and their clients have waived the attorney-client privilege pursuant to the crime/fraud exception. (See, e.g., [BP Alaska Exploration, Inc. v. Superior Court](#) (1988) 199 Cal.App.3d 1240, 1262; [In re Napster, Inc. Copyright Litigation](#) (9th Cir. 2007) 479 F.3d 1078, 1090; [Clark v. United States](#) (1933) 289 U.S. 1, 15.) Under California law, such a determination requires the party invoking the exception to make a *prima facie* showing of the impropriety of the relationship between the attorney and the client. “To invoke the [Evidence Code section 956](#) exception to the attorney-client privilege, the proponent must make a prima facie showing that the services of the lawyer ‘were sought or obtained’ to enable or to aid anyone to commit or plan to commit a crime or fraud.” ([BP Alaska Exploration, Inc., supra](#), 199 Cal.App.3d at 1262, quoting [Evid. Code §956](#).) Once such a finding is made the court *29 determines whether the sought after communications between the attorney and client were reasonably related to the attempted fraud. (*Id.* at 1269.)

Under federal law, the determination of whether the crime/fraud exception exists often occurs at an *in camera* hearing. Prior to conducting an *in camera* review, the court “should require a showing of a factual basis adequate to support a good faith belief by a reasonable person [citation] that *in camera* review of the materials may reveal evidence to establish the claim that the crime-fraud exception applies.” ([United States v. Zolin](#) (1989) 491 U.S. 554, 572, internal quotation marks omitted.) Only then will the court consider “the facts and circumstances of the particular case” before exercising its discretion to determine whether to engage in such a review. (*Ibid.*)

Similarly, California courts allow a party to a matter who believes that another party or counsel has acted unethically to seek relief from the court on a proper showing. (See, e.g., [Rico v. Mitsubishi Motors Corp.](#) (2007) 42 Cal.4th 807, 816 [affirming the disqualification of counsel who inadvertently discovered and improperly utilized the opposing party's work product]). Public nuisance defendants might similarly come to the court if they believe intervention is needed. If the defendants are able to make a *prima facie* showing of actions inconsistent with the neutrality required of counsel prosecuting a public nuisance case, the court may make a particularized inquiry.

*30 Absent such a showing, there is no reason to presume that public entities and their contingent-fee counsel are breaching their duties as set out by the rules and laws that govern them.

CONCLUSION

The risks associated with permitting government entities to retain contingency fee counsel to assist them in litigating public nuisance cases falls far short of the level that would justify an absolute prohibition on such arrangements. The public interest in enabling government entities to bring such suits is too great and the risks of harm too speculative and preventable to permit such a prohibition.

COUNTY OF SANTA CLARA, County of Solano, County of Alameda, County of Los Angeles, County of Monterey, County of San Mateo, City and County of San Francisco, City of Oakland, City of San Diego and City of Los Angeles, Petitioners, v. SUPERIOR COURT OF SANTA CLARA COUNTY, Respondent, Atlantic Richfield Company, et al., Real Parties in Interest.

2009 WL 1541977 (Cal.) (Appellate Brief)

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