Case No. F088471

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

SAN JOAQUIN VALLEY UNIFIED AIR POLLUTION CONTROL DISTRICT,

Plaintiff / Cross-Defendant and Appellant,

v.

SETTON PISTACHIO OF TERRA BELLA, INC.,

Defendant / Cross-Complainant and Respondent.

[PROPOSED] AMICUS CURIAE BRIEF OF THE CALIFORNIA STATE ASSOCIATION OF COUNTIES AND THE SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT IN SUPPORT OF APPELLANT SAN JOAQUIN VALLEY UNIFIED AIR POLLUTION CONTROL DISTRICT

On Appeal from Motion to Disqualify (June 14, 2024)
Tulare County Superior Court
Case No. PCU298746
The Honorable Glade F. Roper

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I. INTRODUCTION

In *People ex rel. Clancy v. Superior Court* (1985) 39 Cal.3d 740, the California Supreme Court held that in a civil public nuisance abatement action, the requirement for representatives of the government to be "absolutely neutral" precluded the District Attorney's use of a contingency fee arrangement with private outside counsel. (*Id.* at p. 748.) Even while precluding the use of outside counsel in the case, the Court took care to note that nothing in its decision should "be construed as preventing the government, under appropriate circumstances, from engaging private counsel." (*Ibid.*) Twenty-five years later, the so-called "*Clancy* doctrine" was "severely limited"[1] by the Supreme Court in *County of Santa Clara v. Atlantic Richfield* (2010) 50 Cal.4th 35 ("*Santa Clara*") when it found that an "absolute prohibition on contingent-fee arrangements" in civil public nuisance actions was "unwarranted." (*Id.* at pp. 52, 56.) The Court continued to find that a heightened standard of neutrality was required in actions in which the government is exercising the People's sovereign prosecutorial power, but concluded that control and supervision by in-house counsel was sufficient to maintain neutrality and integrity. (*Id.* at p. 58.)

Since 2010, the *Clancy / Santa Clara* rule of a heightened standard of neutrality has never been applied outside of the contingency fee context. Nor has it been applied to outside counsel representing a public agency in something other than a prosecutorial role. A rule created to address a narrow set of facts in *Clancy,* which was further narrowed in *Santa Clara,* has stood uniquely in the realm of attorney disqualification cases.

The question in this case is whether the rule should be extended to a

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[1] Kendrick, *The Perils and Promise of Public Nuisance* (2023) 132 Yale L.J. 702, 776-777.

public agency's *defense* counsel conducting work for the agency on an *hourly rate*. The California State Association of Counties and the South Coast Air Quality Management District (Amici) believe the answer to that question is no. The factors that warranted application of a heightened neutrality standard in *Clancy* and *Santa Clara* are simply not present when counsel is providing services to a public agency as defense counsel rather than exercising prosecutorial powers under an agreement that compensates counsel using an hourly rate. The serious negative impacts of applying the heightened neutrality standard, including depriving the public agency of its choice of counsel and placing it at a disadvantage in defending litigation, are not justified in the absence of the special circumstances at play in *Clancy* and *Santa Clara.*

Because the trial court's disqualification order erroneously relied upon the *Clancy / Santa Clara* heightened standard of neutrality in concluding that Shute, Mihaly & Weinberger (SMW) could not represent the San Joaquin Valley Unified Air Pollution Control District (District), the order should be reversed.

II. ARGUMENT

A. The heightened neutrality standard has only been applied in special circumstances not present here and has never been expanded by any court.

The trial court disqualification order relies heavily on the heightened neutrality standard announced in *Clancy.* That standard, however, has only been narrowed by the courts, not expanded as the trial court has done here. And for good reason—the *Clancy* rule was based on unique aspects of the case that do not apply outside of the context of that case.

In *Clancy*, the outside prosecutor, Mr. James Clancy, was disqualified based on the egregious, case-specific facts. Clancy's sliding hourly-fee arrangement operated as something of an unchecked bounty on the public. Because of the constitutional and criminal overtones of the enforcement action in *Clancy*, including the potential for infringement on First Amendment activity, the Court was particularly concerned with the contingency nature of Clancy's work.

But the *Clancy* Court itself recognized the particularized set of facts it faced, warning that "[n]othing we say herein should be construed as preventing the government, under appropriatae circumstances, from engaging private counsel." (*Clancy, supra,* 39 Cal.3d at p. 352; See also *Law Offices of Cary S. Lapidus v. City of Wasco* (2004) 114 Cal.App.4th 1361 [affirming contingency fee agreement between city and private counsel for securities investigation and recovery of funds from bond underwriter].)

Recognizing the distinctiveness of the facts in *Clancy*, the Supreme Court narrowed its application in *Santa Clara.* There, the Court considered a disqualification order of contingency fee-based outside counsel used to assist public agencies in pursuing a public nuisance action against lead paint manufacturers. (*Santa Clara, supra,* 50 Cal.4th at p. 43.) The Court declined to apply the holding in *Clancy* as a brightline rule against contingency fee counsel, making clear that not every civil case in which the government is a litigant "invoke[s] the same constitutional and institutional interests present in a criminal case." (*Id.* at p. 52.) Although the public nuisance action in *Santa Clara* was not strictly private, the Court

concluded the liberty interests at stake were different in kind from those presented in *Clancy*, since "at most" defendants would have to "expend resources to abate the lead-paint nuisance they allegedly created," which, the Court took emphasized, is the "type of remedy one might find in an ordinary civil case." (*Id.* at p. 56.)

The Court concluded that the type of work undertaken by contingency counsel in *Santa Clara* did not "affect the type of fundamental rights implicated in criminal prosecutions or in *Clancy*," and therefore, "the absolute prohibition on contingency fee arrangements imported in *Clancy* from the context of criminal proceedings is unwarranted." (*Ibid.*; See also Kelley, *Rethinking the Public-Private Distinction in Legal Ethics: The Case of "Substitute" Attorneys General* (2010) Mich. St. L. Rev. 423, 438-439.) Thus, the Court held that a contingency fee arrangement was permissible so long as "conflict-free government attorneys retain the power to control and supervise the litigation" because "the heightened scrutiny of neutrality is maintained and the integrity of the government's position is safeguarded." (*Santa Clara, supra,* 50 Cal.4th at p. 58. See also *City and County of San Francisco v. Philip Morris, Inc.* (N.D. Cal. 1997) 957 F.Supp. 1130, 1135 [holding that law firm was not subject to disqualification under the *Clancy* analysis where public counsel retains control of the litigation.])

In so ruling, the the Court noted there are "two extremes on the spectrum of neutrality required of a government attorney." (*Santa Clara, supra,* 50 Cal.4th at p. 55.) In criminal prosecutions or certain public nuisance actions where fundamental liberty interests are at stake, disqualification of a private attorney with a pecuniary

interest in the outcome of the case is mandated. (*Id.* at p. 54.) At the other extreme, in ordinary civil cases, neutrality is not required at all. (*Ibid.*) In the middle are non-criminal public nuisance action, like the one undertaken in *Santa Clara,* in which some level of heightened neutrality is required because such actions involve exercising the People's prosecution power, and there are concerns inherent in exercising that power that require a heightened level of protection. (*Id.* at p. 55.) But in those "middle" cases, neutrality can be protected through agency counsel oversight and disqualification is not required, even if outside counsel is paid on a contingency basis.

The holdings of *Clancy,* as narrowed by *Santa Clara,* however, have never been expanded beyond contingency fee arrangements in which outside counsel is assisting in the prosecution of the case. Thus, "outside counsel not hired on a contingency basis" with "no direct financial interest in the outcome of the litigation" do not raise the same concerns that are addressed in *Clancy* and *Santa Clara* "and the special requirements *Santa Clara* imposes with respect to contingency fee arrangements for outside counsel in civil public nuisance actions, are simply inapplicable here." (*City of Norco v. Mugar* (2020) 59 Cal.App.5th 786, 795.) There have been no cases to even address the further extension used by the trial court here in disqualifying *defense* counsel. And for good reason, as the Supreme Court clearly reserved heightened neutrality for situations in which the government was exercising its prosecutorial power.

Even if *Clancy/Santa Clara* heightened neutrality standard does extend to defense counsel working on an hourly basis, which it does not, the trial court further erred in its complete disregard of the

role of the agency counsel to ensure that any perceived conflict outside counsel may have due to financial incentives does not infect the agency's decision making and ultimate control of the litigation. Contrary to the slew of hypotheticals presented by Respondent (Respondent Br., pp. 41-43), agency counsel retains neutral control over decisions on discovery, settlement, and defense litigation strategy, which mitigate the concerns raised by Respondents. This occurs in real and practical ways. For example, agency counsel regularly provides direction to guide outside counsel in settlement talks and participates alongside outside counsel in such settlement discussions. Similarly, it is typical for in-house counsel to consult and agree to major strategic decisions, including whether to file dispositive motions, before authorizing outside counsel to move ahead with any strategy.

If this neutral in-house oversight is not readily apparent from the retainer agreement, the court can direct that the retainer agreement be amended, as was done in *Santa Clara.* (*Santa Clara, supra,* 50 Cal.4th at p. 65.) When there is such a simple remedy available, depriving an agency of its choice of counsel creates totally disproportionate harm to the agency, as detailed more fully below.

The trial court provided no rationale for extending the *Clancy / Santa Clara* standard outside of the context of contingency fee arrangements in public nuisance abatement actions. The Supreme Court has specifically narrowed application of the rule to the facts of those cases and the Court of Appeal has declined to apply the heightened standard to hourly fee arrangements. To the extent the disqualification order here relied upon *Clancy* and *Santa Clara*, it

must be reversed.

B. Expansion of *Clancy* and *Santa Clara* is not warranted and only serves to disadvantage public agencies in litigation.

The misapplication of the *Clancy / Santa Clara* cases to order disqualification of SMW in this case is not harmless error. Overly broad disqualifications deprive parties of their counsel of choice, and can severely disadvantage public agencies, particularly the hundreds of smaller local public agencies with limited in-house legal resources.

In refusing to disqualify the California Attorney General's use of private counsel in *People v. Attransco Inc.* (1996) 50 Cal.App.4th 1926, the court noted that *only* the Attorney General is in a position to know how the office's personnel and resources can be stretched. Leanly staffed public agencies with severe budget constraints and perhaps a lack of expertise in a particular litigation matter are poorly matched against defendants who are free to hire the counsel of their choice. Outside counsel can bring needed personnel to accomplish tasks that are beyond the capabilities of an agency's in-house counsel and may be the only realistic way to ensure an agency is properly defended in litigation.

In *Attransco*, the Department of Fish and Game employed outside counsel in a case against a corporation to recover cleanup costs from an oil spill. The Attorney General initially handled the litigation but then recommended that the department seek special counsel to assist. The corporation moved to disqualify the private counsel based on civil-service requirements prohibiting state agencies from employing counsel other than

the Attorney General. (Govt. Code, §§11042 et. seq.)

The *Attransco* court quickly homed in on the true motivation behind the motion to disqualify private counsel, noting that it is "unthinkable" that a state agency would be prohibited from recovering costs from pollution clean-up efforts "because they can be outmanned in a paper war." (*Attransco*, *supra*, 50 Cal.App.4th at p. 1930.) The *Attransco* court went further, stating that "every lawyer knows that it is fact of life that a lawsuit can be won or favorably settled if the opposition cannot respond quickly enough to a hefty motion." (*Ibid*.)

The *Attransco* court's pointed discussion of the threats presented by resource inequities during litigation are the same risks at issue with the rule Respondent asks this court to adopt. By way of example, half of the counties in California have eight or fewer in-house civil attorneys. Several counties have only a single in-house attorney. Many cities have no in-house counsel at all and rely entirely on contract private attorneys. (See generally *Montgomery v. Superior Court* (1975) 46 Cal.App.3d 657, 670-671.) Broadening the *Clancy / Santa Clara* rule in the way the trial court has done here may hit these smallest of jurisdictions the hardest because there are often fewer available private attorneys in more remote parts of the State, and the fewer attorneys there are in a region, the more likely it is that those attorneys will have had interactions or provided representation to others in the community who may have some level of interest in the litigation at issue. Using a heightened standard instead of normal disqualification rules would allow adverse litigants to capitalize on connections that a particular firm has with other community members and groups, and could make defending litigation a prohibitive endeavor, leading to losses or settlement terms that a public agency would not otherwise have to make.

Larger jurisdictions would not fare much better. Even though larger public agencies have more attorneys, they have commensurate mandatory legal obligations that may strain the resources they have available to defend litigation. For example, counties are mandated to provide legal advice and representation to county departments, officers, Boards of Supervisors, commissions, and districts, and advance and protect a myriad of diverse interests, including fire and police services, psychiatric emergency services, airport operations, detention services, child protective services, wastewater operations, and landfill operations. No matter the size of the public agency law office, loss of its chosen outside counsel to disqualification will require time, money and effort in seeking new counsel, and the case will likely face delay. (Sutton, *Introduction to Conflicts of Interest Symposium: Ethics, Law and Remedies* (1997) 16 Rev. Litig. 491, 502 [stating that disqualification can easily be used to run up opponent's expenses].)

When resource constraints prevent government attorneys from discharging their obligations, contracting with private attorneys can become an ethical obligation. (Comment, *Public Client Contingency Fee Contracts as an Obligation* (2022) 121 Mich. L. Rev. 145, 149.) "[G]overnment offices tend not to be richly funded, and as litigation becomes more complex and specialized, being able to partner with experience co-counsel might enable government offices to participate in litigation that would otherwise swamp their normal operations." (Article, *The Perils and Promises of Public Nuisance* (2023) 132 Yale L.J. 702, 775-776.) Thus, providing public agencies with latitude to hire counsel of their choosing to assist in defending litigation is a critical component in public lawyers carrying out their ethical responsibilities to provide competent and diligent representation. (Calif. Rules Prof. Conduct, rules 1.1 and 1.3.)

An improperly-imputed conflict leading to unnecessary disqualification also risks systemic harm to the larger system of justice. "An improper disqualification rewards parties who try to lock up the marketplace for legal services, allowing them to pre-emptively take away the choice of counsel from parties that might later stand in opposition. . . . A client with particularly deep pockets can afford to hire multiple excellent firms, giving each a small slice of its legal business – and thereby prevent later opposing parties from hiring those firms." (Robertson, *Conflicts of Interest and Law-Firm Structure* (2018) 9 St. Mary's J. on Legal Malpractice & Ethics 64, 84-85.) "[A]s courts are increasingly aware, motions to disqualify counsel often pose the very threat to integrity of the judicial process that they purport to prevent" because "[s]uch motions can be misused to harass opposing counsel, to delay the litigation, or to intimidate an adversary into accepting settlement on terms that would not otherwise be acceptable. . . . In short, it is widely understood by judges that 'attorneys now commonly use disqualification motions for purely strategic purposes . . . .'" (*Gregori v. Bank of America* (1989) 207 Cal.App.3d 291, 300-301 (internal citations omitted).) These strategic misuses may not be the intent of the parties here, but it will be the result of the rule created by the trial court that Respondent's would have this court adopt. The court should therefore be extremely wary of extending the *Clancy/Santa Clara* rule to hourly fee contracts and defense counsel.

In the absence of the unique interests at stake in *Clancy* and *Santa Clara,* public agencies should have the same ability to choose how to defend litigation and how to allocate resources that private litigants possess. "'Government should have no advantage in legal strife; neither should it be a second-class citizen….Public agencies face the same hard realities as

other civil litigants.'" *Roberts v. City of Palmdale* (1993) 5 Cal.3d 363, 374, *quoting Sutter Sensible Planning, Inc., v. Board of Supervisors* (1981) 122 Cal.App.3d 813, 824-825. There are real world consequences to public agencies as litigants and the justice system at large to adopt the overly broad disqualification rule applied by the lower court. Reversal is therefore warranted.

C. The trial court should have applied an ordinary conflict analysis to determine whether disqualification was required.

The trial court's disqualification order relied upon the heightened standard of neutrality articulated in *Clancy* and *Santa Clara.* For the reasons set forth above, this was done in error. Instead, the court should have evaluated the disqualification motion under ordinary conflict principles, which focus on actual conflicts of interest that cannot be addressed through a competent waiver.

The circumstances under which a client is unable to waive a potential or actual conflict are very narrow. In fact, there are limited categories of unwaivable conflicts of interest in California: (1) informed consent cannot be obtained due to lawyer's inability to provide a disclosure sufficient to render the client's consent informed or the client capacity to consent; (2) the lawyer is able to make an adequate disclosure and the client is willing to agree, but competent representation cannot be provided to both clients; (3) representation is prohibited by statute; and (4) the representation involves the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal. (Mohr, *Spotlight on Ethics: Unwaivable Conflicts of Interest*

(2024) Calif. Lawyers Assn. Magazine, Issue 2, pp. 15-18.)[2] In evaluating Respondent's disqualification motion based on an alleged conflict of interest between SMW's clients, the trial court should have limited itself to a determination of whether the conflict waivers provided by the clients fell within any of these unwaivable conflict categories. If not, the motion should have been denied.

What the trial court appears to have done instead is apply some combination of the heightened neutrality standard in *Clancy/Santa Clara* and a vague "appearance of impropriety" test. In California, however, appearance of impropriety is an inadequate basis for disqualification. (*DCH Health Services Corp. v. Waite* (2002) 95 Cal.App.4th 829, 833.) "As distinguished from judicial recusals, which may be required on the basis of a mere 'appearance of impropriety' (Cal. Code Jud. Ethics, canon 2; see Code Civ. Proc., § 170.1, subd. (a)(6)(C)), such an appearance of impropriety by itself does not support a lawyer's disqualification." (*Ibid.*) Indeed, "speculative contentions of conflict of interest cannot justify disqualification of counsel." (*Smith, Smith & Kring v. Superior Court* (1997) 60 Cal.App.4th 573, 582.)

In addition, courts have expressed particular skepticism about granting disqualification motions where the party seeking disqualification is a litigation adversary who is not personally interested in the alleged conflict, as is the case with Respondent here. In *McPhearson v. Michaels Co.* (2002) 96 Cal.App.4th 843, the plaintiff's lawyer had previously brought a discrimination claim against the same defendant employer in another case involving a different employee. That case resulted in a

[2] This article is available online at: https://calawyers.org/business-law/unwaivable-conflicts-of-interest/#fr01 (as of May 15, 2025).

confidential settlement agreement. When plaintiff's lawyer sought to introduce testimony of the first employee into the *McPhearson* case, the employer moved to disqualify plaintiff's lawyer on the ground that the settlement agreement created a conflict of interest between the two employees. The Court of Appeal concluded the trial court abused its discretion in granting the disqualification order and reversed. (*Id.* at p. 844.) The court noted that with limited exceptions, "a conflict of interest generally may be waived by the persons who are personally interested in the matter." (*Id.* at p. 850.) And due to the potential threat that disqualification orders pose to the judicial system, the court was particularly wary when "the persons who are personally concerned with the alleged conflict of interest are not objecting, and disqualification is sought by a litigation adversary who is not personally interested in the alleged conflict." (*Id.* at p. 849.) The court held that the disqualification order was in error where: (1) "the alleged conflict here is more apparent than real;" (2) "the moving party on this disqualification motion is not personally concerned with the alleged conflict of interest;" and (3) "the persons who are personally concerned with the conflict of interest are not adversarial with respect to each other and have each filed written waivers of the alleged conflict." (*Id.* at pp. 851-852.)

The trial court made similar errors in grating the disqualification orders in this case. The order applied a heightened test for neutrality, relied upon an appearance of impropriety rather than a real conflict, discounted the conflict waivers signed by those with the potential conflict, and elevated the concerns of a litigation adversary not personally concerned with the purported conflict of interest. The order should be reversed.

III. CONCLUSION

For all these reasons, Amici urge this Court to reverse the disqualifying order issued by the trial court.

Dated: May 27, 2025

Respectfully submitted,

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CERTIFICATION OF COMPLIANCE WITH CALIFORNIA RULES OF COURT, RULE 8.204(c)(1)

I hereby certify that this brief has been prepared using proportionately double-spaced 13 point Times New Roman typeface. According to the word count feature in my Microsoft Word software, this brief contains 4,418 words.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this 27th day of May, 2025 in Sacramento, California.

Respectfully submitted,

/s/ *Jennifer B. Henning*
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