

CONTINGENCY FEE COUNSEL IN FORFEITURE PROCEEDINGS

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INTRODUCTION

Private counsel hired by a government entity to pursue litigation are often referred to as “special assistants” or “special attorneys,” therefore, like government attorneys, they are bound by the ethical goal of making sure “justice is done.” *Berger v. United States*.² In other words, in litigating a case on behalf of the government, private counsel are a “representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartiality is as compelling as its obligation to govern at all.” *Id.* In forfeiture proceedings, a contingency fee counsel exchanges legal services for the government entity on the condition that after obtaining a favorable judgment they will be paid a percentage of the money collected from sale of the property which is the subject of the lawsuit. Such arrangements should be carefully scrutinized, because counsel, having a vested personal financial interest, is authorized to make sensitive discretionary decisions traditionally reserved for neutral government lawyers.

I. HISTORY OF PRIVATE COUNSEL LITIGATION

A. Government Hiring of Private Counsel

A government’s use of private counsel is well documented.³ Although private counsel are not considered to be a government employee, they are cloaked with the government’s power and authority to pursue litigation in the best interest of the public. Normally, these attorneys are paid at an flat or hourly rate, regardless of whether or not they are successful in litigating a case. It is well settled that such arrangements, where private counsel are paid a flat or hourly fee, are likely appropriate, ethical, and proper. As explained by one commentator,

paying a flat or hourly rate to private counsel allows the government to access additional resources without adding headcount. . . . Counsel paid on a flat rate or by the hour do not have the same incentive to make decisions--they are not influenced by the chance of getting a windfall or the risk of getting nothing.⁴

Although in most cases, private counsel is supposed to remain under the supervision of the government attorney, these attorneys usually play a significant role in the trial and pretrial stages of the litigation.⁵ Unquestionably, when private counsel is compensated at a hourly or flat

fee rate, there are no incentives for them to pursue the litigation for their own profitability. Like government attorneys, private attorneys in this setting are paid for the quality and quantity of work they actually put into a case, not for the amount of revenue they are able to generate. The same cannot be said, however, of private counsel hired by a government entity on a contingency fee basis.

B. *Private Counsel on Contingency Fee Basis*

While it is not uncommon for a government entity to hire private counsel on an flat fee or hourly basis, hiring private counsel on a contingency basis is a practice that has “long been regarded as ethically suspect” because it “introduces an improper motive to the state sponsored litigation.”⁶ In recent years, instead of using the traditional compensation methods discussed above, a government entity has begun entering into contingency fee agreements with private counsel that gives private counsel the incentive to “pursu[e] lawsuits primarily for their own profitability instead of in the public interest.”⁷ In most contingency fee agreements between a government entity and private counsel, private counsel will receive a percentage of any money recovered by the government entity.⁸

In addition, some of these agreements are drafted to give private counsel unfettered discretion, including deciding who to sue and who not to sue. According to one commentator, “[contingency fee contracts (through the potential to earn huge profits or nothing at all) create powerful incentives for private attorneys wielding the power of the government to make decisions based on their own best interest instead of what is in the best interest of justice.”⁹ Thus, unlike, normal salaried prosecutors or attorneys general, private counsel’s compensation for their efforts are directly tied to their decision on who to pursue and their ability to successfully prosecute and recover money.

In light of the foregoing incentives that private counsel has in pursuing litigation on behalf of the government, it is worth noting that government attorneys are prohibited by certain state laws and the ethical rules from having any kind of financial interest in the outcome of litigation they bring on behalf of the public.¹⁰ Moreover, the ethical rules require courts to determine the reasonableness of contingency agreements.¹¹ Accordingly, while a government can hire private counsel on a contingency fee basis in certain actions, as discussed below, there is significant doubt that utilizing a private counsel in forfeiture proceedings should be allowed.

II. OVERVIEW OF QUASI-CRIMINAL NATURE OF FORFEITURE PROCEEDINGS

The public policy and ethical implications of hiring private counsel to pursue a contingency fee lawsuit are most prevalent in forfeiture actions. Thus, this section briefly discusses the quasi-criminal nature of forfeiture proceedings in which private counsel have even more incentive to litigate cases to further their own financial interest.

Forfeiture proceedings contain both civil and criminal elements, but in most instances such proceedings are quasi criminal in nature. It is well established that forfeiture proceedings “though civil in form, are in their nature criminal.”¹² In particular, the Supreme Court recognized this in *Boyd*, when it stated:

[T]he ground of forfeiture. . . consists of certain acts. . . which are made criminal by statute. . . . Though technically a civil proceeding, it is in substance and effect a criminal one. . . . As, therefore, suits for penalties and forfeitures, incurred by the commission of offenses against the law, are this quasi criminal nature, we think that they are best within the reason of criminal proceedings for all purposes.¹³

In light of the foregoing, while some courts have permitted contingency counsel to represent the government on some matters, none relate to forfeiture or to criminal or quasi-criminal proceedings.¹⁴ Specifically, one California court has stated that “contingent fee contracts for criminal prosecutors have been recognized to be unethical and potentially unconstitutional, but there is virtual no law on the subject.”¹⁵

Accordingly, as discussed below, the quasi-criminal nature of forfeiture proceedings is significant to the question of whether the government can hire private counsel because in such proceedings, private counsel’s compensation is based upon the amount they collect from the forfeiture and seizure of someone’s property.

III. *PEOPLE EX REL. CLANCY V. SUPERIOR COURT*

Before discussing the ethical and public policy implications of the government’s retention of private counsel on a contingency fee basis, it is necessary to discuss the landmark case of *People ex rel. v. Clancy*, which has been interpreted to allow the government to obtain contingency fee counsel provided that the government retains full control over the course of the litigation.¹⁶

In *Clancy*, the City of Corona retained a private lawyer, James Clancy, on a contingency-fee basis to prosecute public nuisance actions against businesses selling obscene publications.¹⁷ The contingency fee agreement provided that Clancy was an independent contractor to be paid \$60 an hour if the city won and recovered attorney fees, or \$30 per hour otherwise.¹⁸ Acting as the city's "special attorney," Clancy filed a complaint against a bookstore and its operator.¹⁹ The defendants moved to disqualify Clancy on the grounds that 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."²⁰ The trial court denied the defendant's motion.²¹ On review, the court issued a writ of mandate "dismissing Clancy as the City's attorney in the pending action."²²

The court began its analysis by "review[ing] the responsibilities associated with the prosecution of a criminal case" and the prosecutor's " 'considerable discretionary power to decide what crimes are to be charged and how they are to be prosecuted.' "²³ Based on its review, the court concluded that a prosecutor has a "duty of neutrality."²⁴ The court later stated that "[w]hen 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."²⁵ In a footnote, the court noted that even if "Clancy may have had little discretion in the decision whether to bring an action," " 'the prosecutor's discretionary functions' " continue through trial.²⁶ Ultimately, 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."²⁷

Although the court in *Clancy* invalidated the at issue contingency agreement, several courts have interpreted the case to uphold such agreements, when private counsel is used to "assist" the government.²⁸

A. California

In *Phillip Morris*, a California district court found that although the at issue contingency fee agreement gave private counsel a financial stake in the litigation, the plaintiffs could still retain them.²⁹ There, the City and County of San Francisco contracted with private counsel to act as " 'Special Attorneys' pursuant to a contingency fee arrangement."³⁰ The City retained private counsel to litigate a case against cigarette manufacturers in which the plaintiffs alleged that the manufacturers "engaged in a conspiracy to mislead the public regarding the dangers associated with smoking."³¹ The defendants moved to disqualify private counsel, citing to *Clancy*, on the grounds that it was "necessary in the furtherance of justice."³² The court disagreed. First, it found that *Clancy* was distinguishable because private counsel was "acting

here as co-counsel, with [. . .] government attorneys retaining full control over the course of the litigation. Then, the court found that “[b]ecause plaintiffs’ public counsel are actually directing this litigation, [it] reasoned that the concerns expressed in *Clancy* regarding overzealousness on the part of the private counsel have been adequately addressed by the arrangement between [private counsel and the government].”³³ Ultimately, the court denied the defendant’s motion to disqualify private counsel.³⁴

B. Maryland

In *Glendenning*, the Maryland Court of Appeals found that *Clancy* was inapplicable where there is oversight of a public official in all aspects of the litigation.³⁵ There, the attorney general entered into a contingency fee agreement with outside counsel “ ‘to provide legal counsel, and litigation services to the Attorney General and the State of Maryland in connection with litigation against the tobacco industry.’ ”³⁶ Specifically, the agreement provided that “compensation of outside counsel is contingent upon the State’s recovery; outside counsel will receive compensation if and only if a money judgment is obtained as a result of the tobacco litigation.”³⁷ The appellants moved to disqualify outside counsel on the grounds that the agreement was unconstitutional, an improper exercise of the attorney general’s authority, and gave outside counsel an improper stake in the litigation.³⁸ The court, however, was not persuaded by the appellant’s arguments.³⁹ The court found that no conflict of interest arose as a result of the contingency agreement between the state and outside counsel because there was an “absence of the oversight of a elected State official,” “whose authority shall be final, sole and unreviewable.”⁴⁰ For this reason, the court upheld the contingency agreement.⁴¹

The foregoing interpretations of *Clancy* are problematic, however, because they do not take into account that even if the government retains control over the litigation, the hiring of private counsel may still violate public policy and certain well established ethical rules.

IV. THE RETENTION OF PRIVATE COUNSEL ON A CONTINGENCY BASIS IN FORFEITURE MATTERS VIOLATES PUBLIC POLICY AND ETHIC RULES

A. A Contingency Fee Gives Private Counsel a Personal Interest in the Outcome of Litigation

It is a violation of public policy to allow private counsel to investigate and prosecute claims on behalf of the government on a contingency-fee basis. As explained by this nation’s highest court, an attorney “is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligations to govern impartially is as compelling as its obligation to govern

at all.”⁴² This neutrality is not only “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.”⁴³ This impartiality is destroyed when prosecutors have a personal interest in the outcome of the litigation, *i.e.*, when their compensation is based on a contingency fee. Moreover, “contingency fee contracts, by their very nature, impede an attorney’s ability to shift his focus from profit to justice because they tie the attorney’s compensation to the financial results of the litigation.”⁴⁴ As noted in *Clancy*,⁴⁵ courts have the authority to disqualify private counsel in a contingent fee arrangement. In *Clancy*, the court found that a government lawyer’s neutrality is essential to a fair outcome for the litigants and to the proper function of the judicial process and held that an attorney appearing on behalf of the government must be disqualified, if he or she has a personal interest in the litigation.⁴⁶

For example, in Kentucky, the law requires the disqualification of prosecutors who have “a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding.”⁴⁷ Indeed, the prohibition against government counsel’s having a personal stake in forfeiture proceedings is widely recognized by prosecutorial authorities, including the United States Department of Justice and the National District Attorneys Association.⁴⁸

Quite simply, a government entity, in delegating this authority to private counsel on a contingency fee basis, usurps the functions of state attorneys general and the prosecutorial system. Such a payment structure is “antithetical to the standard of neutrality” required of government counsel when prosecuting matters within the traditional sphere of governmental functions, particularly in areas such as this one where civil and criminal law converge.⁴⁹

B. The Legal Services Contract Compromises the Integrity of the Judicial System

Employing private counsel on a contingency fee basis in quasi-criminal matters compromises the integrity of the judicial system by undermining the neutrality that must be afforded to these types of proceedings. As noted above, contingency fee agreements grant private counsel broad powers to effectuate a state’s police powers. It gives private counsel authority to investigate claims, to determine which claims merit prosecution and against whom, and to litigate those claims. By giving this expansive, quasi-criminal authority to private counsel on a contingency basis, a government entity allows the judicial system to be compromised.

Courts have long recognized that employing private counsel using a contingency-fee in criminal matters is impermissible.⁵⁰ “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 should not be permitted.⁵¹ These concerns about the neutrality of the prosecuting attorney are equally applicable in cases where mixed criminal and civil matters are at issue.

Quasi-criminal matters, such as forfeiture proceedings, where a state stands to gain monetarily from the successful prosecution of cases, are properly conducted by an Attorney General or by a member of a state’s prosecutorial system, not by private counsel hired on a contingency basis.⁵² There is no debate that a state could not assign one of its prosecutors to litigate a case on a contingent fee basis. A state should not, therefore, be able to avoid this prohibition by retaining outside counsel to serve as *de facto* prosecutors.⁵³

While other courts have permitted private counsel to represent the government on some matters on a contingency-fee basis, none relate to forfeiture or to criminal or quasi-criminal proceedings.⁵⁴ As discussed above, forfeiture proceedings necessarily implicates criminal law, despite the civil procedure used to enforce this proceeding. For this reason, precedent dictates that contingency fee counsel should not be able to prosecute forfeiture proceedings where neutrality is paramount.

C. Contingent Fee Agreements in Quasi-Criminal Cases Violates Ethical Rules

Contingent fee arrangements have historically been prohibited for defense counsel in criminal cases.⁵⁵ Moreover, there are various ethical rules pertaining to conflicts of interest that prohibit an attorney, private or government, from litigating a case in which the attorney has a financial stake. As an attorney and a public officer, by virtue of their representation of the government, private counsel are still subject to applicable ethical rules in his or her respective jurisdiction.

For example, Ethical Consideration 8-8 of the ABA Model Code of Professional Responsibility provides that “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.”⁵⁶ Likewise, private counsel, by virtue of their contingency fee arrangements to pursue litigation on behalf of the government, are also public officers. A contingency fee arrangement conflicts with private counsel’s duty, as a public officer, to serve the public because their motivation to litigate a case might be fueled by their desire for personal gain.

Lastly, the Model Rules of Professional Conduct also have specific ethical norms governing prosecutors which are implicated by private counsel contingency fee arrangements. Prosecutors or private lawyers serving in their stead, assume special responsibilities because of their distinct roles as a “minister of justice and not simply that of an advocate.”⁵⁷ As the Rule reflects, it is vital that actions undertaken on behalf of a sovereign are pursued in the interest of justice rather than for personal interest. A contingency fee agreement in a criminal or quasi-criminal action is suspect because it is contrary to service as a “minister of justice.” As noted above, such an arrangement destroys “the impartiality required of those who govern.”⁵⁸

CONCLUSION

Whether for the defense or plaintiff, counsel should carefully evaluate a contingency agreement in the context of a forfeiture case. A plaintiff’s counsel should be wary and a defense counsel should be diligent to determine the nature of the relationship by utilizing a state’s open record or freedom of information laws. If there appears to be an issue, counsel should communicate their concerns between one another to determine if a resolution is possible. If none can be reached, the court should be notified of the issue so that it can determine whether withdrawal of counsel is required and to also evaluate any initial seizure actions and the underlying basis for the forfeiture lawsuit.

ENDNOTES

1. Ian T. Ramsey is a partner in the law firm Stites & Harbison PLLC, based in its Louisville, Kentucky office, and a member of the International Masters of Gaming Law. Mr. Ramsey is the Chair of Stites & Harbison's Gaming Law Group, and lead Kentucky counsel for the Interactive Gaming Council in the matter styled Commonwealth of Kentucky, ex rel. J. Michael Brown, Secretary, Justice and Public Safety Cabinet v. 141 Internet Domain Names, which concerns the seizure and attempted forfeiture of internet gambling related domain names by the Commonwealth of Kentucky. He is a former Assistant State Attorney for Florida's Twentieth Judicial Circuit and an experienced trial attorney having served as trial counsel in patent, products liability, and complex commercial matters. Vonda F. Kirby is an associate at Stites & Harbison, PLLC where she is a member of the Business Litigation Service Group. She received her B.A. in 2006 from the College of St. Elizabeth and her J.D. in 2009 from West Virginia University College of Law, where she was a member of the Moot Court Board.
2. 295 U.S. 78, 88 (U.S. 1935).
3. See generally, John D. Bessler, *The Public Interest and the Constitutionality of Private Prosecutors*, 47 Ark. L. Rev. 511, 516-21 (1994) (discussing the history of private prosecution in the United States).
4. Richard O. Faulk, *Alchemy in the Courtroom? The Transmutation of Public Nuisance Litigation*, 2007 Mich. St. L. Rev. 941, 971-72 (2007).
5. See, e.g., Leah Godesky, *State Attorneys General and Contingency Fee Arrangements*, 42 Colum. J.L. & Soc. Probs. 587, 615 (2009).
6. See Faulk, *supra* at 968-70.
7. *Id.* at 969.
8. See, e.g., *Philip Morris, Inc. v. Glendening*, 349 Md. 660, 665-66 (Md. 1998) (at issue contingency fee agreement provided that "compensation to outside counsel is contingent upon the State's recovery; outside counsel will receive compensation if and only if a money judgment is obtained as a result of the tobacco litigation"); *Priceline.com Inc. v. City of Anaheim*, 2010 Cal. App. LEXIS 3, at *6 (Cal. App. 4th Dist. Jan. 5, 2010) (a city's contingency fee contract with private law firm provided that "[o]utside counsel, would receive 30 percent of any 'Gross Recovery' and 'the sole contingency upon which the City [would] pay compensation to Special

Counsel is a recovery and collection on behalf of the City, whether by settlement, arbitration award, Court judgment, or otherwise’ ”).

9. See Faulk, *supra* at 968-70.
10. See generally ABA Model Code of Professional Responsibility, EC 8-8 (1980); KRS 15.733(2)(f) (requires that a prosecutor shall disqualify himself from any proceedings in which he “has a financial interest in the subject matter in controversy. . . .”); R.I. GEN. LAWS § 36-14-7(a) (stating that a substantial conflict of interest exists when a public official “has reason to believe that he . . . will derive a direct monetary gain . . . by reason of his . . . official activity”).
11. See ABA Canons of Professional Ethics Canon 13 (1908) (“[a] contract for a contingent fee where sanctioned by law, should be reasonable under all the circumstances of the case, including the risk and uncertainty of the compensation, but should always be subject to the supervision of a Court, as to its reasonableness”).
12. Boyd, 116 U.S. 616, 634 (1886); see also *United States v. Fifty-Eight Drums of Material, etc.*, 38 F.2d 1005, 1007 (D. Pa. 1930); *United States v. One Ford 198X Mustang*, 749 F. Supp. 324, 328 (D. Mass. 1990).
13. 116 U.S. at 633-34.
14. See *State v. Lead Indus. Ass’n*, 951 A.2d 4428, 474-76 (R.I. 2008).
15. *People ex rel. Clancy v. Superior Court*, 39 Cal. 3d 740, 748 (Cal. 1985).
16. See, e.g., *Priceline.com Inc.*, 2010 Cal. App. LEXIS 3, at *20.
17. 39 Cal. 3d at 743.
18. *Id.* at 745, 747.
19. *Id.* at 744.
20. *Id.* at 745.
21. *Id.* at 750.
22. *Id.*

23. Id. at 746.
24. Id. at 746.
25. Id.
26. Id. at 749 n.3.
27. Id. at 750.
28. See Glendening, 709 A.2d at 1242-43; *City & County of San Francisco v. Philip Morris, Inc.*, 957 F. Supp. 1130, 1135 (N.D. Cal. 1997).
29. 957 F. Supp. at 1135.
30. Id.
31. Id. at 1134.
32. Id. at 1135.
33. Id.
34. Id. at 1136.
35. 709 A.2d at 1242-43.
36. Id. at 1231.
37. Id. at 1232.
38. Id. at 1234.
39. Id. at 1235.
40. Id. at 1243.
41. Id. at 1231.
42. *Berger v. United States*, 295 U.S. 78, 88 (1935); see also *Clancy*, 705 P.2d at 350.

43. lancy, 705 P.2d at 351.
44. Faulk, *supra* at 973.
45. 705 P.2d 347.
46. *Id.* at 353.
47. KRS 15.733(2)(f).
48. See, e.g., U.S. DOJ Nat'l Code of Prof'l Conduct for Asset Forfeiture ("No prosecutor's or sworn law enforcement officer's employment or salary shall be made to depend upon the level of seizures or forfeitures he or she achieves."); Nat'l Dist. Attorneys Assoc. Guidelines for Civil Asset Forfeiture ("Salaries and personal benefits of any person influencing or controlling the selection, investigation, or prosecution of forfeiture cases must be managed in such a way that employment or salary does not depend upon the level of seizures or forfeitures in which they participate."); California's Health & Safety Code § 11469 ("No prosecutor's or sworn law enforcement officer's employment or salary shall be made to depend upon the level of seizures or forfeitures he or she achieves.").
49. See Clancy, 705 P.2d at 353.
50. See, e.g., *Baca v. Padilla*, 190 P. 730, 732 (N.M. 1920); *Price v. Caperton*, 62 Ky. 207, 208 (1874).
51. *Baca*, 190 P. at 732.
52. See *David v. Dahlquist*, *Inherent Conflict: A Case Against the Use of Contingency Fees by Special Assistants in Quasi-Governmental Prosecutorial Roles*, 50 DePaul L. Rev. 743, 789 (2000) (listing states that have litigated cases against the tobacco industry without retaining private counsel).
53. See Clancy, 705 P.2d at 351.
54. See, e.g., *Lead Indus. Ass'n*, 951 A.2d at 474–76 (allowing state attorney general to retain contingent fee counsel to assist in litigation of certain matters of a purely civil nature provided the attorney general maintains "absolute and total control over all critical decision-making" in such

cases, and noting that its opinion was subject to being revisited in light of developing law in this area).

55. See Model Rules of Prof'l Conduct R. 1.5 (1983); Baca, 190 P. at 730.
56. Model Code of Prof'l Responsibility EC 8-8 (1980).
57. See Model Rules of Prof'l Conduct R. 3.8 cmt. 1.
58. Clancy, 705 P.2d at 350.