

The Professional Liability Law Blog

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INSURANCE PROFESSIONALS, ACCOUNTANTS AND STOCK BROKERS



[Contingent Fee Agreement Between City and its Outside Counsel is Privileged and Need Not be Disclosed Absent Showing of Facts Supporting an Exception to the Privilege](#)

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Contingency fee agreements are protected by the attorney-client privilege under California Business & Professions Code section 6149. However, in certain types of actions, such agreements are not permitted or their use is subject to limitations. These actions include criminal actions (not allowed) and public nuisance actions brought by a private attorney on behalf of a government entity (subject to limitations). The rationale is that critical government authority should not be delegated to an attorney possessing a personal pecuniary interest in the case. See *People ex rel Clancy v. Superior Court* (1985) 39 Cal.3d 740 and *County of Santa Clara v. Superior Court* (2010) 50 Cal.4th 35.

In *City of Merced v. Merced County Superior Court*, Fifth Appellate District, Case No. F059301, the City retained a private attorney on a contingency fee basis to pursue a public nuisance action against Exxon. Exxon sought production of the contingency fee agreement, apparently with the goal of moving to disqualify the City's counsel on the ground that its agreement violated the limitations stated in *Clancy* and *County of Santa Clara*.

In seeking production of the agreement, Exxon contended that *Clancy*, and its requirement of government attorney neutrality in public nuisance actions, created an exception to the attorney-client privilege found in Business & Professions Code section 6149. In an [unpublished decision](#) dated November 15, 2010, the Court of Appeal did not reach the question of whether such an exception existed. Rather, it concluded that Exxon had failed to make a prima facie showing of facts supporting application of the alleged exception. The court explained that such a preliminary fact showing would include evidence that the provisions required by *Clancy* were not in the agreement (a showing that would be difficult to make without access to the agreement), or that the City of Merced and the private attorney were otherwise violating the duty of neutrality imposed on government attorneys and private counsel acting on their behalf in public nuisance actions.