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Forfeiture of Attorney's Fees: A Trap for the Unwary

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FORFEITURE OF ATTORNEYS' FEES: A TRAP FOR THE UNWARY

I. INTRODUCTION

In recent years Congress has become increasingly concerned over the profitability of criminal activity. With the enactment of both the Racketeering Influenced and Corrupt Organizations Act[1] (RICO) and the Continuing Criminal Enterprise Statute[2] (CCE) in 1970, Congress intended to attack the economic base of persons involved in organized crime and illegal drugs. Both of these statutes contain criminal forfeiture provisions[3] which enhance the effectiveness of the law enforcement community in stripping offenders of their ill-gained profits. Rather than relying on the traditional penalties of fine and imprisonment to deter illegal activity, forfeiture provisions concentrate on the property acquired by a defendant through criminal actions. However, due to ambiguities and limitations in those forfeiture statutes, they were rarely used.

In an attempt to improve the usefulness of the statutes, Congress in 1984 amended the forfeiture provisions.[4] One amendment provides that property subject to forfeiture vests in the hands of the government at the time the illegal act takes place. Under this amendment, the government's interest does not necessarily extinguish when the defendant transfers his interest to a third party.[5] Thus, for the first time, funds which have been transferred by a defendant to his attorney in payment of legal fees became subject to criminal forfeiture.[6] Many defense attorneys believe, however, that these new provisions may violate a defendant's sixth amendment right to counsel. In addition, ethical considerations such as infringement upon the attorney-client privilege, violations of the Code of Professional Responsibility, and other serious conflicts of interest are raised by this statute.

This note will present an analysis of issues surrounding the forfeiture of attorneys' fees and will include a review of recent cases that have addressed this controversy. Part One will present a brief outline of the scope of forfeiture provisions, with special emphasis on the 1984 amendments to the forfeiture statutes. Part Two

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[1] 18 U.S.C.A. §§ 1961-68 (West 1984 & Supp. 1985) (amending 18 U.S.C.A. §§ 1961-68 (West 1970)).

[2] 21 U.S.C.A. § 848 (West 1981 & Supp. 1985) (amending 21 U.S.C.A. § 848 (1970)).

[3] 18 U.S.C.A. § 1963 (West 1984 & Supp. 1985); 21 U.S.C.A. § 848 (West 1981 & Supp. 1985). *See also* 21 U.S.C.A. § 853 (West Supp. 1985). Criminal forfeiture acts as a criminal penalty against a person convicted of a punishable offense. It does not forfeit a person's whole estate, but instead operates against specific property interests derived from the criminal enterprise. For a discussion of in personam versus in rem forfeiture see generally, The Palmyra, 25 U.S. (12 Wheat.) 1 (1827); Clark, *Civil and Criminal Penalties and Forfeitures: A Framework for Constitutional Analysis*, 60 MINN. L. REV. 379 (1976).

[4] Comprehensive Forfeiture Act, Pub. L. No. 98-473, § 301, *reprinted in*, 1984 U.S. CODE CONG. & AD. NEWS 1837, 2040.

[5] 18 U.S.C.A. § 1963(c) (West Supp. 1985); 21 U.S.C.A. § 853 (c) (West Supp. 1985).

[6] *See infra* notes 28-34 and accompanying text (discussing the relation back theory). However, the relation back doctrine has long been used in civil forfeitures. *See* Simons v. United States, 541 F.2d 1351 (9th Cir. 1976); United States v. Stowell, 133 U.S. 1 (1890).

will examine the recent judicial decisions on this subject. Parts Three and Four will respectively address the problems raised by the courts and suggest solutions to those problems.

II. THE SCOPE OF FORFEITURE AND THE CFA

Criminal forfeiture is a relatively new phenomenon in federal law,[7] having been introduced with the RICO and CCE statutes in 1970. Unlike an in rem forfeiture,[8] this type of forfeiture is an in personam proceeding against the defendant based on an adjudication of criminal guilt.[9] Criminal forfeiture must be alleged in the indictment,[10] and upon conviction, a special verdict must be entered against the defendant.[11] As a general rule, forfeitable assets remain in the hands of the defendant prior to conviction. Only after conviction is the government authorized to seize the property.[12]

Congress had hoped that this new form of penal sanction would become a major tool in fighting organized crime and drug trafficking. Unfortunately, the absence of clearly defined procedures and other statutory ambiguities in the original forfeiture statutes impeded the attainment of this objective. The judicial system then became responsible for construing the provisions of the statutes.[13] The results

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[7] This type of forfeiture has existed under the English common law since Medieval times. Forfeitures in personam, or forfeitures of estate, was an added penalty against a person convicted of a felony. *See* Weiner, *Crime Must Not Pay: RICO Criminal Forfeiture in Perspective,* 1 N. ILL. U.L. REV. 225, 229-30 (1981), *quoting* 4 W. BLACKSTONE, COMMENTARIES 354 (New ed. 1813). In the United States, the first Congress abolished this type of forfeiture. Act of April 30, 1790, ch. 9 § 24, 1 Stat. 117 (currently codified at 18 U.S.C. § 3563 (1982)). From that date until 1970, no statute had provided for in personam forfeiture as a criminal penalty.

[8] An in rem forfeiture is taken directly against the offending property, rather than against the person. This type of forfeiture is considered a civil proceeding. A civil forfeiture allows the property to be seized immediately. The case must be brought in the jurisdiction where the property is located. The standard of proof in a civil forfeiture is "the preponderance of the evidence" and generally the guilt or innocence of the owner of the asset is irrelevant. A civil forfeiture proceeding may be used against assets used in drug violations. *See* 21 U.S.C. § 881. In some circumstances, it may be desirable for the prosecution to proceed against the asset civilly rather than criminally. In rem forfeiture has been extensively used in the United States. *See* Note, *Bane of American Forfeiture Law-Banished at Last?,* 62 CORNELL L. REV. 768, 790-792 (1977).

[9] 18 U.S.C.A. § 1963(f) (West Supp. 1985); 21 U.S.C.A. § 853(a) (West Supp. 1985). In addition the CCE provides for a rebuttable presumption that property acquired by a convicted person is subject to forfeiture. 21 U.S.C.A. § 853(d) (West Supp. 1985). Section 1963 does not provide such a presumption.

[10] FED. R. CRIM. P. 7(c)(2).

[11] FED. R. CRIM. P. 31(e).

[12] FED. R. CRIM. P. 32(b)(2).

[13] *See, e.g.*, United States v. McManigal, 708 F.2d 276 (7th Cir.), *vacated,* 464 U.S. 979, *modified,* 723 F.2d 580 (7th Cir. 1983) (property forfeitable does not include proceeds of racketeering activity); United States v. Spilotro, 680 F.2d 612, 617 (9th Cir. 1982) (restraining orders); United States v. Mandel, 505 F. Supp. 189, 192 (D. Md. 1981), *aff'd,* 705 F.2d 446 (4th Cir. 1983) (third party must file claim with Attorney General).

were confusing and disappointing. In an effort to correct the problems, Congress sought to implement new, clearer guidelines for criminal forfeitures.[14] The most significant of these amendments with respect to the forfeiture of attorneys' fees will be discussed below.

A. *Forfeitability of the Proceeds of Criminal Activity*

The 1984 Criminal Forfeiture Act (CFA) both clarifies and expands the type of property that may be subject to forfeiture under RICO and CCE. For RICO violations, the CFA explicitly sets out various interests that may be forfeited.[15] In the statute the word "property" is defined to include realty, personalty, and intangible personal property.[16] Most importantly, the CFA settled the question of whether the proceeds of criminal activity are forfeitable.

Prior to the enactment of the CFA, several courts had held that the criminal forfeiture provisions of RICO were limited to interests in the enterprise and did not apply to income derived from that enterprise.[17] However, the Fifth Circuit had reached the opposite conclusion.[18] The United States Supreme Court granted certiorari to resolve the conflict. In *Russello v. United States*,[19] the Court reviewed the legislative history and structure of RICO. It concluded that "construing section 1963(a)(1) to reach only interests in an enterprise would blunt the effectiveness of the provision in combatting illegal enterprises."[20] The Court found that all proceeds, whether direct or derivative, were forfeitable interests under the statute.[21] Thus, the CFA merely codified the holding in *Russello*.[22]

For drug offenses, the CFA makes the new forfeiture sections applicable to all felony drug offenses.[23] Previously, only the CCE statute had provided for criminal

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[14] Comprehensive Forfeiture Act, *supra* note 4.

[15] 18 U.S.C.A. § 1963(a)(1)-(2)(D) (West Supp. 1985) provides:

(a) whoever violates any provision of section 1962 . . . shall forfeit to the Untied States . . .

(1) any interest the person has acquired or maintained in violation of section 1962.

(2) any—

(A) interest in;

(B) security of;

(C) claim against; or

(D) property or contractual right . . . .

[16] 18 U.S.C.A. § 1963(b) (West Supp. 1985); 21 U.S.C.A. § 853(b) (West Supp. 1985).

[17] *See, e.g.*, United States v. Alexander, 741 F.2d 962 (7th Cir. 1984), *overruled*, United States v. Ginsburg, 773 F.2d 798 (7th Cir. 1985); *McManigal*, 708 F.2d 276; United States v. Marubeni America Corp., 611 F.2d 763 (9th Cir. 1980), *aff'd*, Russello v. United States, 464 U.S. 16 (1983).

[18] United States v. Martino, 681 F.2d 952 (5th Cir. 1982), *aff'd*, *Russello*, 464 U.S. 16.

[19] *Russello*, 464 U.S. 16.

[20] *Id.* at 24.

[21] *Id.* at 22.

[22] 18 U.S.C.A. § 1963(a)(3) (West Supp. 1985).

[23] 21 U.S.C.A. § 853(a) (West Supp. 1985).

forfeiture.[24] The statute also provides that forfeitable property is deemed to include the "proceeds" rather than the "profits" of the illegal operation.[25] This word was deliberately chosen in order to alleviate the need for the government to prove net profits.[26] The statute also borrowed the language "any of the property used or intended to be used" from the civil forfeiture statute[27] in an attempt to broaden the scope of property subject to forfeiture.

The CFA extends the classes of property which may be forfeited, including indirect profits. In the context of attorney fees, the defense attorney should be aware of the source of funds from which his fee is to be paid. If the government can show that the money was derived from the proceeds of criminal activity, those funds may be seized.

B. *The Taint Theory*

Congress was also concerned that the RICO and CCE statutes failed to address the problem of a defendant avoiding forfeiture by transferring, selling, or otherwise disposing of his assets prior to conviction.[28] Under the old statutes, the only method available to prevent such actions was a post-indictment restraining order.[29] The requirements for obtaining a restraining order were quite stringent, thus making it difficult to assure the availability of the assets.[30] In addition, the forfeiture provisions did not prevent the target of an investigation from anticipating the forfeiture action,[31] thereby giving a defendant time to dispose of his assets before any action could be taken against him.

To deal with this problem, Congress applied the *taint theory*, which had long been used in civil forfeiture cases.[32] Under this theory, assets are forfeited at the time of the commission of the illegal acts. The government's interest in that prop-

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[24] 21 U.S.C.A. § 848(a)(2) (West Supp. 1985).

[25] *Cf.* 21 U.S.C.A. §§ 848(a)(2)(A) to 853(a) (West Supp. 1985).

[26] S. REP. No. 225, 98th Cong., 2d Sess. 193, *reprinted in*, 1984 U.S. CODE CONG. & AD. NEWS 3182, 3382 [hereinafter S. REP. No. 225].

[27] *Cf.* 21 U.S.C.A. §§ 853(a)(2) to 881(a)(3) (West Supp. 1985).

[28] S. REP. No. 225, *supra* note 26, at 3378.

[29] 18 U.S.C.A. § 1963(b) (West Supp. 1985); 21 U.S.C.A. § 848(d) (West Supp. 1985).

[30] Some courts had held that the standard in obtaining the restraining order was the same standard required in civil litigation under Rule 65 of the Federal Rules of Civil Procedure. Rule 65 provides that the moving party must show irreparable harm will result from non-issuance of the order. The adverse party is entitled to a full hearing on the merits of the restraining order. *See, e.g.*, United States v. Crozier, 674 F.2d 1293 (9th Cir. 1982), *vacated*, 104 S. Ct. 3575 (1984) (defendant is entitled to a full hearing concerning the issuance of a restraining order including the right to cross-examine); United States v. Long, 654 F.2d 911 (3rd Cir. 1981) (government must demonstrate beyond a reasonable doubt that it will prevail on the merits and that the assets are subject to forfeiture).

[31] This is especially true where grand jury investigation is underway. Unlike civil forfeiture, where property may be seized immediately, the assets remain with the defendant until conviction, providing him with an opportunity to conceal assets.

[32] *See, e.g. Stowell*, 133 U.S. 1; *Simons*, 541 F.2d at 1352. However, until the CFA, the taint theory had never been applied to in personam forfeitures.

erty relates back to that time, and all subsequent transactions are voidable.[33] The intent of this provision is to prevent the defendant from purposely transferring his forfeitable property to a third party in order to avoid forfeiture.[34] This amendment was added to assist the government in preserving forfeitable assets until a conviction could be obtained. The relation back provision is the basis for the thorny problem of forfeiture of attorneys' fees. If a defendant pays his attorney from *tainted* funds, the government has an interest in those funds which is not extinguished because the funds are in the hands of his attorney. These funds, according to the statute, may be forfeited.

C. *Claims of Third Parties*

Section 1963(c) provides for the forfeiture of property where the accused has transferred his assets in an effort to avoid the economic consequences of forfeiture.[35] However, because an innocent purchaser may have acquired a forfeitable asset subsequent to the illegal act, the CFA provides for an ancilliary hearing to adjudicate the claims of third parties asserting an interest in the property to be forfeited.[36]

Prior to the enactment of this provision, a third party was required to petition the Attorney General for relief.[37] The Attorney General's decision regarding such petitions was discretionary and nonreviewable.[38] Because third parties could not take part in the criminal trial, they had no way to challenge the validity of the forfeiture order. Thus, a hearing, popularly known as a section (m) hearing, may be provided for judicial review of third party claims.

Under the new procedure, the court may consolidate all third party claims arising from the same order of forfeiture.[39] A third party will prevail if he proves that he falls into one of two categories: first, if his claim in interest is superior to the defendant's at the time of the acts giving rise to the forfeiture or, second, if he is a bona fide purchaser and had no reason to believe the property was subject to forfeiture.[40] The burden of proof is on the third party to prove his claim by a preponderance of the evidence.[41]

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[33] 18 U.S.C.A. § 1963(c) (West Supp. 1985); 21 U.S.C.A. § 853(c) (West Supp. 1985).

[34] "The purpose of this provision is to permit voiding of certain preconviction transfers and so close a potential loophole in current law whereby the criminal forfeiture sanction could be avoided by transfers that were not 'arms length' transactions." S. REP. No. 225, *supra* note 23 at 3384.

[35] 18 U.S.C.A. § 1963(c) (West Supp. 1985). The statute provides that "any [forfeitable] property that is subsequently transferred to a person other than the defendant may be the subject of a special verdict of forfeiture . . ." 21 U.S.C.A. § 853(c) (West Supp. 1985) contains a similar provision.

[36] 18 U.S.C.A. § 1963(m) (West Supp. 1985); 21 U.S.C.A. § 853(n) (West Supp. 1985).

[37] 18 U.S.C.A. § 1963(c) (West Supp. 1985); *See also Mandel,* 505 F. Supp. 189 (approving this procedure).

[38] *Mandel,* 505 F. Supp. at 191-92.

[39] 18 U.S.C.A. § 1963(m)(4) (West Supp. 1985); 21 U.S.C.A. § 853(n)(4) (West Supp. 1985).

[40] 18 U.S.C.A. § 1963(m)(6) (West Supp. 1985); 21 U.S.C.A. § 853(n)(6) (West Supp. 1985).

[41] The third party has the burden of proof because the government has already established the forfeitability of the property in the criminal trial.

This hearing provides an important procedural function with regard to attorneys' fees. If the funds used to pay the attorney are adjudged forfeitable, the attorney can petition the court for a hearing on the matter. If the attorney can prove that he falls under one of the categories in the statute, the forfeiture order will be amended. On the other hand, disclosure by an attorney in a section (m) hearing of information concerning the source of his fee may go beyond the scope of the attorney-client privilege.

III. SURVEY OF CASELAW

Since the enactment of the CFA, forfeitures of attorneys' fees increasingly have become an integral part of RICO and CCE prosecutions.[42] Accordingly, courts are just beginning to consider the issues relating to criminal forfeiture. The CFA dramatically alters the way in which RICO and CCE cases are prosecuted, and the recent cases that deal with the CFA reflect the magnitude of those changes. Up to this point, only five courts have specifically addressed the issues surrounding forfeiture of attorneys' fees.[43] The scope of issues raised by the courts, as well as the results of these cases, have varied widely,[44] thus, strongly suggesting that the controversy surrounding forfeiture of attorneys' fees will continue.

A. *United States v. Rogers*

The first court to consider the implications of the CFA on forfeiture of attorneys' fees was the United States District Court in Colorado in *United States v. Rogers*.[45] In *Rogers*, the defendants had been charged with violations of RICO and a number of other offenses. Contemporaneous to the indictment, the government filed a petition for an order to restrain the transfer or disposition of property owned by the defendants. Counsel for the defendants objected to the restraining order and filed a motion asking the court to exclude their attorney fees and costs from forfeiture. The defendants based their argument on two alternative theories: first, that the forfeiture amendments were not intended to apply to legitimate legal services and, second, that the CFA violated their sixth amendment rights to counsel.[46]

The court initially examined the provision of the statute relating to assets

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[42] *See* S. REP. No. 225, note 26 at 3374-75.

[43] United States v. Ianniello, No. S. 85 Cr. 115 (CBM) (S.D. N.Y. Sept. 4, 1985); United States v. Badalamenti, 614 F. Supp. 194 (S.D.N.Y. 1985); United States v. One Parcel of Land, 614 F. Supp. 183 (N.D. Ill. 1985); United States v. Payden, 605 F. Supp. 839 (S.D.N.Y.), *rev'd on other grounds*, 767 F.2d 26 (2nd Cir. 1985); United States v. Rogers, 602 F. Supp. 1332 (D. Col. 1985).

[44] For instance, the court in *One Parcel of Land* upheld the forfeiture of attorneys' fees and gave the right to counsel issue only prefunctory treatment. On the other hand, the court in *Rogers* undertakes a complete statutory analysis. The *Payden* case considers the question in terms of a request for fee information by the grand jury. Of the five reported cases, two, *One Parcel of Land* and *Payden* would allow forfeiture of attorneys' fees. The others, the *Rogers, Badalmanti,* and *Ianniello* courts would reject forfeiture of attorneys' fees based on various grounds.

[45] *Rogers*, 602 F. Supp. 1332.

[46] *Id.* at 1334.

transferred to third parties and determined that, in order to be immune from forfeiture, a third party must be a bona fide purchaser without knowledge that the property was subject to forfeiture.[47] After citing the dictionary definition of a bona fide purchaser,[48] the court stated that an attorney who received fees in exchange for services performed gave value. However, a more troublesome question remained as to whether the attorney had knowledge of the forfeitability of the property.[49] The statute did not specifically address whether attorneys' fees were forfeitable, therefore the court turned to the legislative history for clarification.

In analyzing the intent of the legislature, the court discussed the language of a Senate Report. "An order of forfeiture may reach only property of the defendant, save in those instances where transfer to a third party is voidable."[50] Furthermore, the court quoted from the discussion concerning the definition of a bona fide purchaser. The legislative history notes that "[t]he provision should be construed to deny relief to third parties acting as nominees of the defendant or who have knowingly engaged in sham or fraudulent transactions."[51] Relying on this language, the court concluded that legitimate attorneys' fees could not be forfeited, since the fees were not paid as part of a scheme to avoid forfeiture.[52]

As further proof that Congress intended attorneys' fees to be exempt from forfeiture, the court cited a comment from a House Judiciary Committee Report which discussed similar legislation.[53] The Committee stated that "[n]othing in this section is intended to interfere with a person's sixth amendment right to counsel."[54] The court compared the rendering of legal services to the compensation earned by a doctor or grocer and determined that payment for legitimate services was not intended to be included in forfeitable property.[55]

The court then considered the defendants' sixth amendment claims. In the first

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[47] *See* 18 U.S.C.A. § 1963(c) (West Supp. 1985); 21 U.S.C.A. § 853(c) (West Supp. 1985).

[48] *Rogers,* 602 F. Supp. at 1346.

[49] The court recognized that knowledge of the contents of the indictment has been held to be sufficient notice to the attorney. *See, e.g.*, United States v. Raimondo, 721 F.2d 476, 478 (4th Cir. 1983), *cert. denied,* 105 S.Ct. 133 (1984); *Long,* 654 F.2d at 917. *Accord, Payden,* 605 F. Supp. 839.

[50] S. REP. No. 225, *supra* note 23 at 208.

[51] *Id.* at 209 n.47.

[52] *Rogers,* 602 F. Supp. at 1347.

[53] *Id.* The similar legislation involved amendments to the Comprehensive Drug Penalty Act of 1984.

[54] H. R. REP. No. 845, 98th Cong. 2d Sess. 19 n.1 (1984). The court did not cite the next sentence of the quote, which may shed some light on the committee's meaning. The second sentence states "The Committee, therefore, does not resolve the conflict in District Court opinions on the use of restraining orders that impinge on a persons right to retain counsel in a criminal case." *Id.* Another court has construed this quote to mean that Congress intended this issue be left open for the courts to resolve. *See Payden,* 605 F. Supp. at 850 n.14.

[55] *Rogers,* 602 F. Supp. at 1348. The court suggested that the right to an attorney may be a "necessity of life," not unlike food, clothing, and shelter. *Id.* at n.5. *See also* United States v. Ray, 731 F.2d 1361, 1365 (9th Cir. 1984).

of these claims, the defendants argued that the threat of forfeiture prevented them from securing counsel of their choice.[56] The government, on the other hand, contended that the attorney could only avoid forfeiture by proving that the fees were untainted. The court neither denied or accepted either claim, but instead relied on its earlier conclusion that legitimate attorneys' fees were exempt from forfeiture.[57] The second claim by the defendants involved the section (m) hearing, which would require the attorney to testify concerning the source of his fee to avoid forfeiture. The defendants argued that this procedure would threaten the attorney-client privilege. The court agreed with this position[58] and found the information disclosed at a section (m) hearing would go far beyond the scope of the privilege, thereby chilling the open communication between attorney and client.[59]

Finally, the court addressed the impact of the CFA on the criminal justice system. The court expressed concern over the growing cost and complexity of RICO prosecutions and questioned whether a court appointed attorney could adequately defend such charges. The court also suggested that the government could manipulate the adversary process by systematically eliminating skilled defense lawyers through a threat of forfeiture.[60] The court then denied the government's restraining order and granted the defendant's motion to exclude attorneys' fees from forfeiture.[61]

B. *United States v. Payden*

In *United States v. Payden*,[62] the issue of forfeiture of attorneys' fees arose in a completely different context. The defendant in *Payden* sought to quash a subpoena issued to his attorney by the grand jury. The grand jury was attempting to elicit testimony concerning the defendant's fee arrangement with his attorney. The defendant claimed the subpoena violated his sixth and fifth amendment rights.[63]

The district court was faced with the question of whether a defense attorney would be "discouraged" from preparing a defense because of the threat of forfeiture of his fee.[64] In oral argument of the case, counsel for the defense had contended that attorneys' fees were not forfeitable. Although this contention was not directly at issue in the case, the court found it necessary to respond at length because the purpose of the subpoena was to gather information that could be used at a later date by the government at a hearing to forfeit attorneys' fees.[65]

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[56] *Rogers*, 602 F. Supp. at 1348. The court stated the argument in this manner "if counsel cannot be paid, they will not work and clients will suffer." *Id.*

[57] *Id.* at 1349.

[58] *Id.* Information related to fees may be privileged if disclosure of that information would tend to implicate the client in a crime. *See infra* text accompanying notes 155-66.

[59] *Id.*

[60] *Id.* at 1349-50.

[61] *Id.* at 1351.

[62] *Payden*, 605 F. Supp. at 839.

[63] *Id.* at 843.

[64] *Id.* at 848.

[65] *Id.* at 849 n.14.

In its analysis, the court reviewed the reasoning of the court in *Rogers* and strongly disagreed with many of its conclusions. An overriding concern of the court was the potential for abuse if forfeitable property was allowed to be transferred from client to lawyer. The court reasoned that immunity from forfeiture of attorneys' fees would allow lawyers to shield illegal laundering schemes by their clients.[66] The court also questioned the *Rogers* court's interpretation of the legislative history of the CFA. It observed that, because a defense attorney is put on notice of forfeiture by the indictment, an attorney who accepted fees subject to forfeiture could not have done so in an arm's length transaction. Therefore, the attorney could not claim he was a bona fide purchaser without knowledge.[67]

The court also refuted the argument that the defendant could not secure the attorney of his choice because of the threat of forfeiture. Noting that the title to forfeited assets is not resolved until after trial, the court pointed to the provisions which place the assets in the hands of the government at the time the act is committed. In this court's view, third parties who took title to assets with knowledge of their potential for forfeiture did so at their own risk.[68] In addition, the court challenged the *Rogers* court's reliance on the often-cited House Report, implying that the statement was taken out of context. Instead, the court found that the issue of sixth amendment rights had been purposely left open for the courts to resolve.[69]

In conclusion, the court reiterated its position that exclusion of attorneys' fees would foster illegal sheltering of funds and declined to allow suspect fees to be used to pay for an attorney. As the court noted, "[A] defendant cannot obtain a Rolls-Royce with the fruits of a crime, he cannot be permitted to obtain the services of the Rolls-Royce of attorneys from these same tainted funds."[70]

C. *United States v. One Parcel of Land*

The government in *United States v. One Parcel of Land*[71] had filed a civil action against the defendant's real estate, money, cars, and other property, alleging these articles were subject to forfeiture pursuant to the CCE statute. The defendant then moved to have his attorneys' fees and costs removed from the forfeiture order. In defense of the motion, the defendant raised three basic issues: 1) that attorneys' fees were not expressly mentioned in section 881 and therefore were not forfeitable; 2) that the defendant's attorneys fell within the innocent owner exception; and 3) that the statute violated the defendant's sixth amendment rights.[72]

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[66] *Id.* (quoting *In re* Shargel, 742 F.2d 61 (2nd Cir. 1984)). *See also* Att'y subpoenas, A.B.A. J., Mar. 1, 1986, at 32, col. 1 (lawyers aid criminal organizations in their illegal activities).

[67] *See infra* text accompanying notes 115-22 for a discussion on whether an attorney could claim he was a bona fide purchaser.

[68] *Payden*, 605 F. Supp. at 849 n.14.

[69] *Id.* at 850 n.14.

[70] *Id.*

[71] *One Parcel of Land*, 614 F. Supp. 183.

[72] *Id.* at 185.

In a simple, direct opinion, the District Court for the Northern District of Illinois denied the defendant's motion.[73] The court examined the language of the statute which provided that "all monies" used to facilitate or derived from drug transactions were subject to forfeiture and determined that attorneys' fees fell within the broad category of "monies."[74] The court then discussed the innocent owner provision of the statute.[75] The defendant's attorneys claimed they acquired an interest in the property by performing legal services after the illegal act had taken place. Therefore, they were innocent owners and exempt from forfeiture.[76] The court pointed to the relation back provision of the statute which operated to give title to the government when the illegal act had occurred. Thus, the court concluded that the fees, although in the hands of third parties, were still subject to forfeiture. Furthermore, the court found that the attorneys could not have been bona fide purchasers since they were aware of the forfeiture allegations through the indictment.[77]

Finally, the court dealt with the defendant's claim that his sixth amendment rights had been violated. The court succinctly dealt with this issue, stating that a defendant's choice of counsel may be dictated by economics.[78] The court also noted that appointed counsel is available in cases where the defendant is not able to retain one.[79]

D. *United States v. Badalamenti*

In declining to follow *United States v. Payden*,[80] the United States District Court for the Southern District of New York held that attorneys' fees are not subject to forfeiture and would probably violate the sixth amendment.[81] In *United States v. Badalamenti*[82] the government issued a subpoena which required a defense attorney to disclose the defendant's fee records.[83] The government contended this information would provide evidence of illegal income which was necessary to prove a criminal drug violation.[84] The defendant moved to quash the subpoena, asserting various claims including violations of the attorney-client privilege and the sixth amendment right to counsel.[85]

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[73] *Id.* at 187.

[74] *Id.* at 185. *See* 21 U.S.C.A. § 881(a)(6) (West Supp. 1985).

[75] *See* 21 U.S.C.A. § 881(a)(6) (West Supp. 1985). The statute provides: "no property shall be forfeited . . . by reason of any act of ommission established by that owner to have been committed or omitted without the knowledge or consent of that owner."

[76] *Id.* at 185-86.

[77] *Id.* at 186.

[78] *See also Ianniello*, S. 85 Cr. 185, slip op. at 14; *Rogers*, 471 F. Supp. at 851.

[79] *Id.* at 187.

[80] *Payden*, 605 F. Supp. at 839; *Badalamenti*, 614 F. Supp. at 197.

[81] *Badalamenti*, 614 F. Supp. at 198.

[82] *Id.* at 194.

[83] *Id.* at 195.

[84] *See* 21 U.S.C.A. § 848(b)(2)(B) (requiring evidence of substantial income).

[85] *Badalamenti*, 614 F. Supp. at 195.

The court held that Congress clearly did not intend to interfere with a defendant's opportunity to obtain the counsel of his choice. After noting that a defendant's attorney would likely be aware of the source of funds from which his fees were paid,[86] the court suggested that any prudent attorney would refuse to take a RICO case, and even if he did take the case, he would subject himself to conflicts of interest.[87] Thus, the court concluded that a defendant in a RICO case would have difficulty obtaining a lawyer if attorneys' fees were allowed to be forfeited. The court construed the statute to exempt attorneys' fees from forfeiture, but noted that, even if the attorneys' fees were intended by Congress to be forfeitable, the statute interfered with an accused's right to counsel.[88]

E. *United States v. Ianniello*

Forfeiture of attorneys' fees was also considered in another recent case in the District Court for the Southern District of New York. In *United States v. Ianniello*,[89] the defendants were charged with RICO violations in connection with several companies they owned and operated. The government sought and received an *ex parte* restraining order prohibiting the disposition of certain property belonging to the defendants, including their interest in the companies.[90] The defendants requested the court to distribute certain profits that the restrained companies earned following the filing of the indictment. In addition, the defendants brought a motion to exclude attorneys' fees from forfeiture in order that they could be represented by their chosen counsel.[91]

The court began its analysis by examining the statute. The statute does not explicitly provide for forfeiture of attorneys' fees, so the court turned to the legislative history. In following the same analysis as the *Rogers* court,[92] it found that legitimate attorneys' fees were not forfeitable.

The court next addressed the defendants' sixth amendment rights. It found that forfeiture of attorneys' fees would make it difficult to secure counsel because the threat of the loss of his fee would make an attorney reluctant to handle the case.[93] Furthermore, the court maintained that a court appointed attorney would not be available to defendants who otherwise had money available to pay for an attorney, even if that money was inaccessible.[94] Therefore, the court reasoned that a defendant's sixth amendment right to counsel would be violated by the CFA.

The court cited other potential problems created by the forfeiture of attorneys'

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[86] *But see infra* text accompanying notes 167-76 for a discussion of possible conflicts of interest.

[87] *Id.* at 196.

[88] *Id.* at 198.

[89] *Ianniello*, No. S. 85 Cr. 115.

[90] *Id.* at 3.

[91] *Id.* at 4.

[92] *Id.* at 6-7. *See also* text accompanying notes 50-55 for the *Rogers* court analysis of this issue.

[93] *Ianniello*, No. S. 85 Cr. 115, slip op. at 9-10.

[94] *Id.* at 10.

fees, including the chilling of the attorney-client relationship and violations of the Code of Professional Responsibility. The court found that forfeiture of attorneys' fees affected the defendants' ability to prepare their legal defenses, which the court deemed a violation of the sixth amendment.[95]

The last issue considered by the court was whether a portion of the retained earnings from their corporation could be released so that the defendants could obtain the counsel of their choice. The court pointed out that the restraining order obtained by the government precluded the hiring of counsel. While the court realized that economics will impose some limitations on the defendants' choices of counsel, it asserted that depriving the defendants of the counsel of their choice would amount to denying them a "necessity of life."[96] The defendants' motion was therefore granted.[97]

IV. Problems Raised by the CFA

As previously discussed, courts are now beginning to examine the sweeping changes brought about by the enactment of the CFA. Forfeiture of attorney's fees under the CFA creates substantial problems that need to be addressed. Although it would be impossible to discuss in detail all of the issues raised by the courts, several areas do warrant further attention.

A. *Are Attorneys' Fees Forfeitable?*

The CFA's relation back amendment was a deliberate attempt by Congress to limit the transfer of forfeitable assets from the defendant to a third party.[98] The statutes are silent, however, on which assets once transferred are subject to forfeiture. Some courts have construed the statute to include all property transferred following the illegal act, including attorneys' fees.[99] Other courts have interpreted the statute to apply to only those transactions with indicia of sham or fraud and not to the legitimate rendering of legal services.[100] Thus, questions remain as to whether Congress intended that attorneys' fees should be forfeitable and, secondarily, whether an attorney could be exempted from forfeiture by proving he was a bona fide purchaser under the statute.

The penalty of forfeiture must first be examined in light of the overall purposes of RICO and CCE. The legislative history of these statutes clearly demonstrates Congress' concern over the increasing power and economic strength of illegal organizations.[101] In enacting RICO for example, Congress declared, "It is

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[95] *Id.* at 11-12.
[96] *Id.* at 14-15.
[97] *Id.* at 17.
[98] S. Rep. No. 225, *supra* note 26 at 3378-79.
[99] *See One Parcel of Land*, 614 F. Supp. 183; *Payden*, 605 F. Supp. 839.
[100] *Ianniello*, No. S. 85 Cr. 115; *Badalamenti*, 614 F. Supp. 194; *Rogers*, 602 F. Supp. 1332.
[101] Pub. L. No. 91-452, 84 Stat. 922, § 1 (1970).

the purpose of this Act to seek the eradication of organized crime in the United States . . . by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime."[102] In order to meet those objectives, Congress stressed the need for new legal weapons to combat the problems.[103] Congress also directed that the statute was to be liberally construed.[104] Since that time, the goals of the statute have been recognized and affirmed by the Supreme Court.[105]

In enacting the RICO and CCE statutes, Congress probably did not anticipate that forfeitable property could encompass attorneys' fees. Prior to the CFA, however, several courts had been confronted with the question of whether a defendant could be barred from using forfeitable assets to pay his attorney. In *United States v. Long,*[106] the Third Circuit upheld the forfeiture of an airplane which had been transferred to an attorney as payment of legal fees about six months before the indictment of the defendant was filed.[107] This case was cited with approval in the Senate Report describing the history of the CFA.[108] Similiarly, in *United States v. Raimondo,*[109] the Fourth Circuit allowed the forfeiture of attorneys' fees where the funds were derived from the profits of the defendant's cocaine operation.[110] Finally, in *United States v. Bello,*[111] a district court dismissed the defendant's claim that he would be denied counsel due to an order restraining his assets, stating that the defendant could not use forfeitable assets to defend racketeering charges.[112] However, none of these cases discussed the forfeiture of attorneys' fees in regard to a violation of the sixth amendment.

The CFA amendments were an attempt to further enhance forfeiture procedures in order to fully utilize their capacity to fight crime. The statute defines assets that are in the hands of the defendant as absolutely forfeitable.[113] However, in subsection (c), Congress addresses property that is in the hands of third parties by providing that "*any* such property that is subsequently transferred to a person . . ." may be subject to forfeiture.[114] The language used by Congress is clear and unambiguous.[115] Attorneys' fees are not singled out for exemption from the stat-

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[102] *Id.*

[103] *See* S. REP. No. 91-617 at 76 (1969).

[104] Pub. L. No. 91-452, § 904(a), 84 Stat. 947 (1970).

[105] *See* United States v. Turkette, 452 U.S. 576, 588-89 (1981).

[106] *Long,* 654 F.2d at 911.

[107] *Id.* at 916.

[108] S. REP. No. 225, *supra* note 26 at 338 n.28.

[109] *Raimondo,* 721 F.2d 476.

[110] *Id.* at 478.

[111] United States v. Bello, 470 F. Supp. 723 (S.D. Calif. 1979).

[112] *Id.* at 725.

[113] 18 U.S.C.A. § 1963(a) (West Supp. 1985); 21 U.S.C.A. § 853(a) (West Supp. 1985).

[114] 18 U.S.C.A. § 1963(c) (West Supp. 1985); 21 U.S.C.A. § 853(c) (West Supp. 1985).

[115] In *Turkette,* the Supreme Court stated: "In determining the scope of a statute, we look first to its language. If the statutory language is unambiguous, in the absence of 'a clearly expressed leg-

ute. Thus, within the plain meaning of the words, any forfeitable property transferred to an attorney is subject to the terms of the statute.

With the general goals of RICO and CCE in mind, disallowing forfeiture of attorney's fees paid from the proceeds of criminal activity seems contrary to the intent of Congress in enacting the CFA. If the statute is construed to exempt attorneys' fees from forfeiture, a defendant could use the proceeds of his criminal activity to pay for his defense. A defendant could hire the attorney of his choice who would be, in effect, subsidized by illegal funds. However, because at the time of the illegal act title to the defendant's property vests in the government the defendant's attorneys' fees would be paid out of government funds. In view of the expressed intent of Congress to dismantle the economic base of these organizations, this result seems illogical.

Furthermore, an attorney who has accepted tainted fees could not claim he was a bona fide purchaser. The CFA states that a third party may challenge a forfeiture order by showing that he is a bona fide purchaser without cause to believe that the property was forfeitable.[116] Assuming that the attorney was not involved in a fraudulent transaction,[117] the issue is whether the attorney could be deemed to have knowledge of the government's interest in the assets. In most instances, the attorney would have knowledge that a particular asset is forfeitable at the time of the indictment or the government's application for a restraining order. Some courts have held that knowledge of the indictment itself could constitute notice to a third party.[118] Still, actual notice may depend on how specific an asset is described in the forfeiture count. If the property is specifically described, then knowledge may be presumed. On the other hand, generic or general statutory language may not be sufficient to inform the attorney that a particular asset is forfeitable.[119]

Another method of meeting the "knowledge" requirement is to show that the attorney knew the asset resulted from a prohibited activity. It is likely that an attorney would discover the source of his fee in preparing the defense of his client.[120]

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islative intent to the contrary, that language must ordinarily be regarded as conclusive'" *Id.* at 580 *quoting* from Consumer Prod. Safety Comm'n. v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980).

[116] 18 U.S.C.A. § 1963(c) (West Supp. 1985); 21 U.S.C.A. § 853(c) (West Supp. 1985).

[117] Several courts have expressed their concern over the use of lawyers laundering illegal money. *See Payden,* 605 F. Supp. at 849 n.14, *citing Shargel,* 742 F.2d 61. This subject is beyond the scope of this Note.

[118] *See, e.g., Raimondo,* 721 F.2d at 478; *Long,* 654 F.2d at 917. Also, under § 853(d), property acquired during the period of violation where there was no other possible source is presumed to be forfeitable. 21 U.S.C. § 853(d). This presumption should suffice to give notice to the attorney.

[119] *See generally,* UNITED STATES ATTORNEY'S MANUAL, Title 9 § 9-111.511. However, in a civil forfeiture proceeding, assets subject to forfeiture must be specifically identified since the proceeding is against the *res.*

[120] In a criminal case, the attorney is ethically bound to investigate the case. MODEL CODE OF PROFESSIONAL RESPONSIBILITY, EC 4-1 (1980) "A lawyer should be fully informed of all the facts of the matter he is handling in order for his client to obtain the full advantage of our legal system."

Proof that the attorney knew of the forfeitability could also be obtained through testimony at trial, from others involved in the same criminal activity, or by voluntary disclosure.[121] The evidence relevant to establish knowledge would necessarily be resolved on a case by case basis.

Knowledge that the attorney knew the source of the illegal funds could also be established through circumstantial evidence. Generally, facts concerning payment of attorneys' fees and the defendant's sources of income have been held to be non-privileged.[122] Therefore, if the government could show that the accused paid his attorney even though he had not held a paying job in the time period alleged in the indictment, this evidence could be used to prove unexplained wealth.[123]

In light of the above analysis, it seems doubtful that Congress contemplated an exclusion for attorneys' fees from forfeiture. Absent any constitutional problems with this conclusion,[124] such an interpretation would contravene the purpose behind the CFA. In addition, the majority of attorneys would have notice that the fees were subject to forfeiture, either through the indictment or restraining order. Therefore, the attorney would not be entitled to the bona fide purchaser defense.

B. *The Sixth Amendment and the CFA*

The sixth amendment guarantees a defendant "the Assistance of Counsel for his defense."[125] As one court stated, "the sixth amendment right to counsel has four different components: 1) the right to have counsel, 2) a minimum quality of counsel, 3) a reasonable opportunity to select and be represented by chosen counsel and 4) the right to a preparation period sufficient to secure minimum quality counsel."[126] Of these four categories, two could arguably be impacted by forfeiture of attorneys' fees under the CFA.

The sixth amendment unquestionably guarantees the right to have counsel in federal criminal prosecutions.[127] Although much of the case law in this area has dealt with the rights of indigents to have counsel appointed,[128] the right to have counsel in criminal forfeiture cases arises in a different context. In forfeiture cases,

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[121] UNITED STATES ATTORNEY'S MANUAL *supra* note 119 at § 9-111.512.

[122] *Shargel,* 742 F.2d 61; *In re* Osterhoudt, 722 F.2d 591 (9th Cir. 1983); United States v. Hodgson, 492 F.2d 1175 (10th Cir. 1974).

[123] *See, e.g., In re* Witnesses Before The Special March, 1980 Grand Jury, 729 F.2d 489 (7th Cir. 1984) (subpoena for client's expenditures); United States v. Jeffers, 532 F.2d 1101 (7th Cir. 1976), *vacated in part on other grounds,* 432 U.S. 137 (1977) (evidence of substantial income from a continuing criminal enterprise); *Shargel,* 742 F.2d 61 (evidence of unexplained wealth inconnection with tax violations).

[124] *See Ianniello,* No. S. 85 Cr. 115; *Badalamenti,* 614 F. Supp. 194; *Rogers,* 602 F. Supp. 1332.

[125] U.S. CONST. Amend. VI.

[126] Birt v. Montgomery, 725 F.2d 587, 592 (11th Cir.), *cert. denied,* 105 S. Ct. 232 (1984).

[127] Johnson v. Zerbst, 304 U.S. 458 (1938).

[128] *See, e.g.,* Gideon v. Wainwright, 372 U.S. 335 (1963).

this right involves the ability of a defendant to retain counsel due to the threat of forfeiture of attorneys' fees following the conviction.

Sixth amendment problems could arise in cases in which a defendant is indicted under either RICO or CCE and the government obtains a restraining order.[129] In a scenario such as this, the defendant would then approach an attorney to represent him. Fearing forfeiture, the attorney would conduct his own investigation to determine whether the assets used to pay his fee were legitimate. The outcome of the scenario would depend upon the result of the investigation.

If a restraining order exists against all of the defendant's assets, funds will not be available to pay the retainer. The prospective attorney would then be forced to wait until the trial is over to collect his fees.[130] The uncertainty inherent in this situation would force the attorney to question the source of the money in order to ensure payment. If the attorney determined that the funds were tainted, he would refuse to take the case, knowing that his fees would be seized. On the other hand, if the attorney were satisfied that he could prove the funds were not obtained through criminal activity, there would be no reason to deny representation.

Also implicit in the sixth amendment right to counsel is the opportunity of the accused to select and be represented by counsel of his choice.[131] Recognition of this right reflects protection of the defendant's prerogative to choose the way in which he will present his defense.[132] Thus, "the defendant must be given a reasonable opportunity to employ and consult with counsel; otherwise, the right to be heard by counsel would be of little worth."[133] Nevertheless, the right to counsel of choice is not absolute,[134] but must be balanced against the public's interest in the prompt and efficient administration of justice.[135]

A survey of the case law in this area reveals that the denial of the right to counsel of choice occurs mainly after counsel has been engaged to represent a defendant. In situations where the defendant has asked for a continuance,[136] re-

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[129] *See* 18 U.S.C.A. § 1963(e) (West Supp. 1985); 21 U.S.C.A. § 853 (e) (West Supp. 1985). In order to obtain a restraining order prior to the filing of an indictment, the government must prove: 1) that there is a substantial probability the government would prevail on the forfeiture issue, 2) that failure to enter the order could diminish the property, and 3) that the need to preserve the property outweighs the hardship. *Id.*

[130] *See infra* text accompanying notes 168-71.

[131] Powell v. Alabama, 287 U.S. 45, 53 (1932); Chandler v. Freytag, 348 U.S. 3, 10 (1954); Urquhart v. Lockhart, 726 F.2d 1316, 1319 (8th Cir. 1984); United States v. Burton, 584 F.2d 485, 488-89 (D.C. Cir. 1978), *cert. denied,* 439 U.S. 1069 (1979).

[132] Faretta v. California, 422 U.S. 806, 834 (1975).

[133] *Chandler,* 348 U.S. at 10.

[134] Richardson v. Lucas, 741 F.2d 753, 756 (5th Cir. 1984); *Birt,* 725 F.2d at 593; United States v. Gray, 565 F.2d 881, 887 (5th Cir.), *cert. denied,* 435 U.S. 955 (1978).

[135] Linton v. Perini, 656 F.2d 107, 109 (6th Cir. 1981), *cert. denied,* 454 U.S. 1162 (1982); *Urquhart,* 726 F.2d at 1319; *Burton,* 584 F.2d at 489.

[136] *See, e.g.,* Ungar v. Sarafite, 376 U.S. 575, 589-91 (1964); Gandy v. State, 569 F.2d 1318, 1324-25 (5th Cir. 1978).

quested permission to substitute counsel,[137] or revealed an attorney conflict of interest,[138] the defendant's right to counsel of choice must be balanced against the court's interest in the prompt disposition of criminal cases.[139] However, the issue of the right to counsel of choice in criminal forfeiture cases stems from a different source. In those cases, a defendant's ability to choose counsel may be limited by the amount of money he has to retain an attorney.

The claim that the right to counsel of choice depends on the financial resources of the defendant is a novel argument. To date, only two courts have recognized and discussed this proposition.[140] In a real sense, however, economics will always play a role in determining whom a defendant will engage as his attorney, whether in a CFA forfeiture action or any other criminal action. A defendant's desire to be represented by a particular attorney will be limited to those attorneys he can afford. In this respect, forfeiture provisions are similar to other legal claims, in that the limited resources of the defendant may jeopardize acceptance of the case.

In forfeiture cases, the economic limitation will be in the form of a restraining order obtained by the government.[141] Consequently, it is the actions of the government which prevent the defendant from utilizing restricted funds to pay for counsel of choice. No court as yet has recognized "any distinction between defendants rendered indigent by circumstances of life and one who became indigent by the actions of the government."[142] It remains to be seen if this argument will be accepted by the courts.

C. *The Attorney-Client Privilege*

The attorney-client privilege is essential to the adversarial system if the attorney is to fulfill his role as an advocate.[143] The purpose of the privilege is "to encourage clients to make full discolsure to their attorneys"[144] so that the client

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[137] *See, e.g.*, United States v. Brown, 744 F.2d 905, 908 n.2 (2nd Cir.), *cert. denied*, 105 S. Ct. 599 (1984); United States v. Welty, 674 F.2d 183, 188 (3rd Cir. 1982); United States v. Hart, 557 F.2d 162, 163 (8th Cir.), *cert. denied*, 434 U.S. 906 (1977).

[138] United States v. Cronic, 466 U.S. 648 (1984); Holloway v. Arkansas, 435 U.S. 475 (1978); Wood v. Georgia, 450 U.S. 261 (1981).

[139] *Powell*, 287 U.S. at 59.

[140] *Rogers*, 471 F. Supp. at 851. "Economic realities impose one obvious limitation on the defendant's right to be represented by a particular attorney." *Id. Ianniello*, No. S. 85 Cr. 115, slip. op. at 14 (government's action in lawfully obtaining an ex parte restraining has created defendants' financial inability to pay counsel of their choice).

[141] *See* 18 U.S.C. § 1963(e) (West Supp. 1985); 21 U.S.C.A. § 853(e) (West Supp. 1985).

[142] *E.g.* United States v. Brodson, 241 F.2d 107, 111 (7th Cir.), *cert. denied*, 354 U.S. 911 (1957) (rejecting distinction between an indigent and in a person who was rendered indigent by tax liens); *Bello*, 470 F. Supp. at 725 (restraining order did not deprive defendant of counsel of choice). *But see Ianniello*, No. S. 85 Cr. 115, slip. op. at 14-15 (suggesting the contrary).

[143] 8 WIGMORE ON EVIDENCE § 2291 (McNaughton Rev. 1961) (discussing the premise behind the attorney-client privilege).

[144] Fisher v. United States, 425 U.S. 391, 403 (1976).

may obtain fully informed legal advice. In order to build an effective defense, the attorney and client must be able to predict which conversations are privileged.[145] Furthermore, the adversarial system demands that the attorney for the defense must be able to prepare his case unhindered by the government.[146]

The attorney-client privilege does not shield all communications between attorney and client. In order to be protected by this privilege, the communication must be made in confidence from a client to his attorney acting in his legal capacity.[147] The privilege does not apply if the communication was not meant to be confidential[148] or if the attorney was not called upon to give legal advice.[149]

1. Section (m) Hearings

After an order of forfeiture is entered in a CFA forfeiture case, a third party is entitled to challenge the order through a section (m) proceeding.[150] Under the statute, the burden is on the lawyer to prove he did not know that the property was subject to forfeiture.[151] However, this burden of proof can only be met by violating the attorney-client privilege. In order to prove a claim,[152] the attorney is forced to reveal much more than the simple fee arrangement. He is required to disclose facts and circumstances to prove that the source of the fee is legitimate. Because this information derives from confidential communications with his client, the attorney is placed in the untenable position of choosing between his fee or his client.

The ultimate effect of this situation is to "chill" the relationship between the attorney and client.[153] If the client was aware that incriminating information could be disclosed, he would be less likely to speak freely and openly with his attorney.[154]

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[145] Upjohn Co. v. United States, 449 U.S. 383 (1981). "[T]he attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected." *Id.* at 393.

[146] Hickman v. Taylor, 329 U.S. 495, 511 (1947); United States v. Levy, 577 F.2d 200, 209 (3rd Cir. 1978).

[147] *See* WIGMORE, *supra* note 143 at § 2292.

[148] *E.g.* United States v. (Under Seal), 748 F.2d 871 (4th Cir. 1984); United States v. Pipkins, 528 F.2d 559 (5th Cir.), *cert. denied,* 426 U.S. 952 (1976).

[149] Colton v. United States, 306 F.2d 633 (2nd Cir. 1962), *cert. denied,* 371 U.S. 951 (1963); Diversified Indus. Inc. v. Meredith, 572 F.2d 596 (8th Cir. 1977).

[150] 18 U.S.C.A. § 1963(m) (West Supp. 1985); 21 U.S.C.A. § 853(n) (West Supp. 1985). Both statutes call for essentially the same type of hearing. For convenience sake, we will refer to third party ancillary hearings as "section (m)" hearings.

[151] 18 U.S.C.A. § 1963(m)(6)(B) (West Supp. 1985); 21 U.S.C.A. § 853(n)(6)(B) (West Supp. 1985).

[152] The attorney-third party would have the burden of proving his fees *were not* forfeitable. *See* 18 U.S.C.A. § 1963(m)(6) (West Supp. 1985); 21 U.S.C.A. § 853(n)(6) (West Supp. 1985).

[153] *See, e.g., In re* Special Grand Jury No. 81-1 (Harvey), 676 F.2d 1005, 1009 n.4 (4th Cir.), *vacated and withdrawn,* 697 F.2d 112 (4th Cir. 1982). (A subpoena issued to an attorney could cause a wedge between the attorney and client); *Shargel,* 742 F.2d at 63, "[W]e would be less than candid not to concede that the lack of a privilege against disclosure of the fact of an attorney relationship may discourage some persons from seeking legal advice at all." *Id.*

[154] *But Cf. Fisher,* 425 U.S. at 403; *Shargel,* 742 F.2d at 62; Handgards, Inc. v. Johnson & Johnson, 413 F. Supp. 926, 929 (N.D. Calif. 1976).

Thus, the defendant's sixth amendment right to effective representation may be violated by the section (m) hearing.

2. Disclosure of Fee Information

It is likely that an attorney may be called upon to testify about the source of his fee during a CFA forfeiture case.[155] Depending on the jurisdiction, this information may or may not be protected under the attorney-client privilege. Virtually all jurisdictions recognize the rule that information regarding fees is not privileged.[156] However, in special circumstances, some courts have taken the approach that the attorney-client privilege applies to any fee information which might tend to incriminate the client.[157] In those jurisdictions, the attorney would be prohibited from disclosing any information regarding his fee arrangement with a client. This could have serious consequences for an attorney seeking to recover his fees in a section (m) hearing.

The source of this rule originates from a Ninth Circuit case, *Baird v. Koerner.*[158] In *Baird,* an attorney representing a client, who wished not to be identified, sent a check to the Internal Revenue Service (IRS).[159] The IRS sought to have the client's identity revealed.[160] The Ninth Circuit held that the identity of the client was privileged because disclosure of the client's identity could have linked the individual to a crime. Therefore, this information was a confidential communication protected by the attorney-client privilege.[161]

Eventually the incrimination theory evolved into whether disclosure of fee information "would implicate that client in the very criminal activity for which legal advice is sought."[162] Although this exception to the attorney-client privilege has recently been called into question in the Ninth Circuit,[163] courts as recently as the *Rogers* opinion have recognized and applied the incrimination theory.[164]

It is possible that courts adhering to this theory would find that disclosure

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[155] *See* Att'y subpoena, *supra* note 66 (citing skyrocketing number of lawyers subpoenaed).

[156] *See In re* Witnesses Before the Special March 1980 Grand Jury, 729 F.2d at 492; *Shargel,* 742 F.2d at 62; United States v. Sherman, 627 F.2d 189, 190 (9th Cir. 1980); *In re* Walsh, 623 F.2d 489, 494 (7th Cir.), *cert. denied,* 449 U.S. 994 (1980).

[157] The Third, Fourth, Fifth, Ninth, Tenth, and Eleventh Circuits have applied this rule although the Ninth Circuit has recently called the rule into question. *See In re* Grand Jury Proceedings (Twist), 689 F.3d 1351 (11th Cir. 1982); *In re* Grand Jury proceedings (Pavlick), 680 F.2d 1026 (5th Cir. 1982); *Harvey,* 676 F.2d 1005, United States v. Hodge & Zweig, 548 F.2d 1347 (9th Cir. 1977); *Hodgson,* 492 F.2d 1175; *In re* Grand Jury Investigation, 631 F.2d 17 (3d Cir. 1980), *cert. denied,* 449 U.S. 1083 (1981).

[158] Baird v. Koerner, 279 F.2d 623 (9th Cir. 1960).

[159] *Id.* at 626.

[160] *Id.* at 627.

[161] *Id.* at 633.

[162] *Hodge & Zweig,* 548 F.2d 1353.

[163] *Osterhoudt,* 722 F.2d 591.

[164] *Rogers,* 602 F. Supp. at 1349.

of fee information would violate a defendant's sixth amendment rights. This is especially true where disclosure of fees would go to prove substantial income, an essential element of some crimes.[165] In RICO and CCE prosecutions, evidence of a defendant's assets may be central to proving the government's case.[166] Thus, in jurisdictions that have expanded the scope of the attorney-client privilege to include fee information, attorneys seeking to recover their fees may find they cannot admit evidence of the fee arrangement.

D. *Other Conflicts*

Several moral and ethical problems are raised by subjecting attorneys' fees to forfeiture. Although these problems have been alluded to earlier, they are worth discussing in detail. A lawyer who has accepted a forfeiture case may find that his actions have violated the Code of Professional Responsibility. An attorney has a duty to represent his client zealously,[167] yet his actions may conflict with the Code.

As has been previously stated, if an attorney accepts a case where the defendant has no current assets to pay his fee, the attorney must wait until the end of the trial to obtain payment. If the defendant is found guilty, his assets will be forfeited,[168] and the attorney will not be paid.[169] Thus, the payment of the fee depends on the outcome of the trial.[170] This situation is not unlike a contingent fee in civil cases and could be construed as such.[171] In taking the case, the attorney has set himself up for possible ethical violations.

Furthermore, the conflict between representing the client and the Code of Professional Responsibility becomes even more apparent when a plea bargain is offered. The lawyer has a duty to exercise independent professional judgment on behalf of his client.[172] On the other hand, the attorney has a financial interest in avoiding the loss of his fee. The attorney is placed in a Catch 22 position. If he recommends a guilty plea, he will be able to keep his fee. However, he may be

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[165] *See* 21 U.S.C. § 848(b)(2)(B); 18 U.S.C. § 1962. *E.g. Sherman,* 627 F.2d at 190-192 (disclosure of amount of attorney fees in IRS investigation); *Jeffers,* 532 F.2d 1101 (attorney fees evidence of substantial income).

[166] *See supra* text accompanying note 123.

[167] MODEL CODE OF PROFESSIONAL RESPONSIBILITY CANON 7.

[168] 18 U.S.C. § 1963(a); 21 U.S.C. § 853(a).

[169] *But see* note 187 for a discussion of possible recovery of fees under the Criminal Justice Act.

[170] A lawyer is prohibited from acquiring a financial interest in the outcome of criminal litigation. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-103, EC 5-7 (1981).

[171] MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-106(c) (1981) states: "a lawyer shall not enter into an arrangement for, charge, or collect a contingent fee for representing a defendant in a criminal case."

[172] MODEL CODE OF PROFESSIONAL RESPONSIBILITY CANON 5 (1981).

accused of financial self interest.[173] In either circumstance, his decision would be subject to intense scrutiny.

Thus, representation of a client in a CFA forfeiture case would inevitably result in a conflict of interest which would impair the defendant's right to effective representation. One court has suggested a bifurcated trial or the use of civil forfeiture provisions to cure the problems.[174] However, one of the main purposes of the CFA was to consolidate all claims against forfeitable assets in order to expedite the judicial process.[175] At this point it is uncertain how the demands of the statute can be met without violating the defendant's right to conflict-free counsel.

V. SOLUTIONS

As it currently stands, the CFA creates a tension between the objectives of the statute and the rights of a defendant. The intent behind the CFA is admirable and should be pursued; however, Congress must balance the aims of the statute against the effect it could have on the criminal justice system.[176] In order for the statute to function as it was designed, courts must recognize the premise that all property transferred to third parties may be subject to forfeiture.[177] This includes legal services that have been paid for with illegal monies. On the other hand, the statute must foster the role of the defense attorney in the criminal defense system[178] and, in turn, strive to protect his fee. These goals could be accomplished in several ways.

As it is now written, the CFA places an unwritten affirmative duty on the attorney to question the defendant as to the source of his fee before accepting representation.[179] This duty arises from the nature of the statute. The attorney must be certain that the source of his fee is legitimate or risk losing them through

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[173] *See, e.g.*, MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-101. "A lawyer should refuse employment when his own interest may impair his independent professional judgment."

[174] *Payden*, 605 F. Supp. at 850 n.14.

[175] S. REP. No. 225, *supra* note 26 at 3379.

[176] *See generally* Reed, *Criminal Forfeiture Under the Comprehensive Forfeiture Act of 1984: Raising the Stakes*, 22 AM. CRIM. L. REV. 747 (1985); Kreiger & Van Dusen, *The Lawyer, the Client and the New Law*, 22 AM. CRIM. L. REV. 737 (1985).

[177] *See supra* text accompanying notes 101-115. *But see, Ianniello*, No. S. 85 Cr. 115, *slip.* op. at 7-8; *Badalamenti*, 614 F. Supp. at 196; *Rogers*, 602 F. Supp. at 1347.

[178] *See generally* Note, *Government Intrusions into the Defense Camp: Undermining the Right to Counsel*, 97 HARV. L. REV. 1143 (1984); Frankel, *The Search for Truth Continued: More Disclosure, Less Privilege*, 54 U. COLO. L. REV. 51 (1982).

[179] *See Ianniello*, No. S. 85 Cr. 115, slip op. at 11. "Defense counsel might question defendant prior to accepting representation in order to determine whether the money to be paid for the legal fee came from legitimate sources as opposed to illicit undertakings." *Id.*

forfeiture. The prudent attorney will verify the source of his fee before committing himself to defend the case.

During the initial interview, the attorney should inform the prospective client of the law and that he is required to substantiate the source of his fee.[180] The attorney should make an independent investigation in order to confirm the information so that his fee is protected from forfeiture. In some situations, verification could be made easily, such as confirming a person's salary or personal holdings. However, in other circumstances, establishing which monies are untainted could prove to be a difficult problem. In any case, the attorney must be able to bring forth enough evidence to substantiate the source of the fee, or risk forfeiture.[181]

Several reasons support the requirement that the attorney verify his fee. If fees could be forfeited only if the attorney participates in a scheme to transfer forfeitable assets, this would lessen the attorney's incentive to investigate his client's case. The less he knew about his client's affairs, the better chance he would have of retaining his fee. Placing the burden on the attorney would discourage deliberate blindness and shift the burden to the defense counsel to ensure compliance with the goals of the CFA.

Secondly, it would also dissuade attorneys from involving themselves in illegal laundering schemes that have been mentioned by several courts.[182] There is evidence that some lawyers work closely with organized crime.[183] Lawyers would be under an affirmative duty to investigate their fees, thereby reducing the risk of immunity from criminal acts. The system would benefit from lifting the shield off this type of activity.

The duty to investigate should attach at the time of the indictment, because at that time the government is required to give notice that it intends to forfeit the defendant's assets.[184] Following notice by indictment, the government would seek to restrain those assets it believed were subject to forfeiture. In order to receive a restraining order, the government must demonstrate with substantial probability that it could prevail at trial that the assets were traceable to illegal acts.[185] Thus, at the indictment stage, the attorney should have sufficient notice of the forfeiture, and it is at this stage that the duty would be established. Attorneys representing

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[180] MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-8 states "A lawyer should exert his best efforts to insure that decisions of his client are made only after the client has been informed of relevant considerations."

[181] *See* 18 U.S.C.A. § 1963(m) (West Supp. 1985); 21 U.S.C.A. § 853(n) (West Supp. 1985).

[182] *See Shargel,* 742 F.2d at 64; *Payden,* 605 F. Supp. at 849 n.14. *See also Lawyers and Organized Crime,* NAT. L. J., Sept. 24, 1984 at 1, col. 3.

[183] *See* Att'y subpoena, *supra* note 63 at 32, col. 1; *Mob Defenders: As corrupt as their Clients?,* A.B.A. J., July 85 at 32-33.

[184] FED. R. CRIM. P. 7 (c)(2).

[185] 18 U.S.C.A. § 1963(e) (West Supp. 1985); 21 U.S.C.A. § 853(e) (West Supp. 1985).

a defendant at the pre-indictment stage would be entitled to reasonable attorneys' fees awarded by the court.[186]

The defendant who is unable to retain counsel with his own funds has another available alternative. In circumstances where a restraining order bars the defendant's ability to pay counsel, the accused is eligible for appointed counsel under the Criminal Justice Act.[187] Under this Act, the court is entitled to appoint counsel if the defendant is financially unable to obtain counsel.[188] The court examines the defendant's financial capacity,[189] including his access to funds available to pay an attorney.[190] It seems clear that a defendant whose monies were restricted by a government restraining order would be entitled to court-appointed representation.

Once the attorney has determined that representation is possible, a method to establish the legitimacy of his fee would be necessary. Currently, the only procedure available to an attorney to recover his fee is through a section (m) hearing.[191] However, the attorney-client privilege threatens the effectiveness of this third-party remedy.[192] A viable solution to this problem would be to create an exception to the attorney-client privilege in this instance.

A statutory exception would allow the attorney to testify on the stand at a section (m) hearing concerning the source of his fee. The exception would be limited to testimony relating to the attorneys' fees only, and would not extend to other information covered by the attorney-client privilege. If the attorney had properly determined that the fees were not tainted at the indictment stage, he would not be required to divulge any incriminating evidence against his client. This limited exception would guarantee the defense attorney the right to defend his fee

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[186] It is entirely possible that the attorney commenced representation prior to the filing of the indictment. If we assume that the duty to investigate would not attach until notice was given by indictment, then the attorney is entitled to compensation for services rendered up to that point, whether or not the fees were tainted.

What is not clear is whether an attorney could be eligible for appointment following trial. For example, if the attorney undertook representation in the expectation of recovering his fee pursuant to a section (m) hearing, but he was unable to establish the legitimacy of his fee and consequently they were forfeited. It may be possible for the attorney to apply for retroactive appointment under the CJA. The act states "Such appointment may be made retroactive to include any representation furnished pursuant to the plan prior to appointment." 18 U.S.C. 3006A(b) (1985). Thus, technically the attorney could receive compensation by filing for attorneys fees prior to trial.

[187] 18 U.S.C. § 3006A.

[188] 18 U.S.C. § 3006A(b).

[189] Indigency is not a necessary requirement to obtain appointed counsel. The defendant need only show that adequate legal representation is beyond his means. United States v. Cohen, 419 F.2d 1124 (8th Cir. 1969).

[190] United States v. Kelly, 467 F.2d 262, *cert. denied*, 411 U.S. 933 (1973); United States v. Coniam, 574 F. Supp. 615 (D.C. Conn. 1983).

[191] 18 U.S.C. § 1963(m); 21 U.S.C. § 853(n).

[192] *See supra* text accompanying notes 150-154.

without violating his ethical obligation to his client. This scenario also presumes that the client is aware of this proceeding.

A final problem could be solved by requiring that no plea bargain could include payment of attorneys' fees. Due to the large numbers of defendants who enter into plea bargains,[193] a defense attorney who recommends a plea bargain to his client may also be ensuring the payment of his own fee. By denying prosecutors the opportunity to put counsel in a position of conflict, the problem could be avoided.

VI. CONCLUSION

The passage of the CFA is an admirable attempt by Congress to reshape the law and procedures in the area of criminal forfeiture. The Act reflects Congress' bipartisan support for escalating the war on crime, while strengthening the weapons of law enforcement. Unfortunately, as in many legislative projects of this kind, the CFA also contains unanticipated problems which could undermine the utility of the statute. As in the past, the courts will be faced with the challenge of balancing the rights of the defendant against the needs of the criminal justice system. In the case of the CFA, this process is just beginning. However, with proper judicial intervention and some slight modifications, many of these problems may be overcome.

[193] *See* H. MILLER, W. MCDONALD & J. CRAMER, PLEA BARGAINING IN THE UNITED STATES 16-24 (1978).