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The 1984 RICO Amendments: Will Defendants and their Attorneys be Short-Changed?

RICO, the Racketeering Influenced and Corrupt Organization Act,[1] is the most significant piece of federal legislation ever enacted pertaining to patterned criminal conduct.[2] The original purpose of RICO was to take the economic incentive out of organized crime.[3] In 1984, Congress amended RICO,[4] and as a result, the amendments may adversely impact RICO defendants and their attorneys.

In January 1979, a federal task force was formed in San Francisco.[5] to develop a case against members of the Hells Angels Motorcycle Club for RICO violations.[6] The task force consisted of agents from the Drug Enforcement Agency and the FBI.[7] An investigation was prompted due to suspicion of prolific involvement by the Hells Angels in the manufacture and distribution of methamphetamine.[8] The government was also concerned about the illicit association of the Hells Angels with firearms.[9] In July 1979, thirty-three Hells Angels were indicted as a result of the task force investigation.[10] The indict-

1. Pub. L. No. 91-452, 84 Stat. 941 (1970).
2. Wynn & Anderson, *Organized Crime, RICO, and the Media; What We Think We Know*, 46 FED. PROBATION 9, 10 (Dec. 1982).
3. S. REP. No. 225, 98th Cong., 2d Sess. 191-92, *reprinted in*, 1984 9A U.S.CODE CONG. & AD. NEWS 1587-89.
4. Pub. L. No. 98-473, 98 Stat. 2040, 2192 (1984) [hereinafter referred to as the 1984 amendments].
5. Federal Bureau of Investigation, U.S. Dep't of Justice, *Digest of RICO Investigations* 121 (1979-1980) [hereinafter cited as *Digest of RICO Investigations*].
6. *Id.* at 121-22.
7. *Id.*
8. *Id.* at 121.
9. *Id.* The task force intensified the investigation when a Solano County Sheriff narcotics detective was nearly killed by an explosive device on the day he was scheduled to testify against a member of the Hells Angels. Similar attempts were reported on the lives of San Jose and San Diego investigators involved in Hells Angels cases. *Id.*
10. *Id.* at 122.

ment charged that certain members of the Hells Angels maintained a drug enterprise.[11] The enterprise was involved in the unlawful manufacture, distribution, and possession of heroin, cocaine, marijuana, methamphetamines, LSD, and seconal.[12] The indictment further specified that members of the Hells Angels had used every illegal means necessary to ensure the continued existence and success of the drug enterprise.[13] Members of the motorcycle club used sophisticated electronic equipment to monitor law enforcement activity.[14] Records were maintained on known or suspected informants, law enforcement officers, potential witnesses, and other persons who posed a threat to the drug enterprise.[15] The information gathered often led to more violent tactics. The motorcyle club resorted to murder, assault, and bribery of law enforcement officers.[16] Threats and intimidation were used to discourage persons from testifying against club members.[17] RICO was used in the indictment of the Hells Angels because the statute was designed to halt these patterns of criminal activity.[18]

Journalists, scholars, law enforcement officials, and laymen associate organized crime with the Mafia and with other ruthless groups like the Hells Angels.[19] The Congressional Statement of Findings and Purposes for the Organized Crime Control Act of 1970[20] makes clear that Congress viewed "the Mob" as the target of organized crime legislation.[21] In practice, however, RICO has been applied to a broader range of defendants.[22] RICO has been used to encompass not only those who fit the traditional stereotype of organized crime members, but also defendants involved in more ordinary activity.[23] The number of RICO cases that have arisen in the past ten years supports this premise. Between 1970 and 1975 few cases were brought under RICO.[24]

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11. *Id.* at 123.
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.* at 1.
19. *See* Martens & Longfellow, *Shadows of Substance: Organized Crime Reconsidered,* 46 FED. PROBATION 3, 3-9 (Dec. 1982).
20. Pub. L. No. 91-452, 84 Stat. 941 (1970).
21. *See* H.R. REP. No. 30, 91st Cong., 2nd Sess. 1 (1970).
22. Wynn & Anderson, *supra* note 2, at 9-10.
23. *Id.* at 12. The defendants prosecuted under RICO who are not organized crime members are generally involved in a host of common white collar crimes. These white collar crimes include fraud, corruption, and embezzlement. *Id.*
24. *Id.*

The number of RICO cases escalated, however, soon after prosecutors became familiar with the new statute and discovered the breadth of conviction powers under RICO.[25] By 1979, well over 200 criminal prosecutions were initiated under the statute.[26] Between 1980 and 1983 close to 560 persons were prosecuted under RICO.[27] Other reports show the volume of RICO cases continues to increase.[28] The natural result of the increased application of RICO is that more attorneys are called upon to defend the accused.

The 1984 RICO amendments may adversely affect those engaged in criminal defense work.[29] One federal court has construed the new amendments to permit the forfeiture of defense attorneys' fees upon the conviction of a RICO defendant.[30] Since more defense attorneys are now involved in RICO cases, a forfeiture of fees construction will have a severe impact on many attorneys.[31] California defense attorneys working in both the federal and state courts will lose their fees in RICO cases if a forfeiture construction is adopted.[32] This consequence is particularly devastating because defense of RICO cases requires a substantial amount of time and effort.[33] For example, the 1979 Hells Angels trial lasted eight months.[34] The eight month period did not include the months spent between indictment and trial in preparation of the case.[35] As a result of the time expended for the defense of RICO cases, attorneys' fees are enormous. The average private defense attorney receives a minimum of $100,000 in legal fees for a complex RICO case.[36]

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25. *Id.*
26. *Id.*
27. Admin. Off. of the U.S. Cts., *Sentences Imposed Chart* (1980-1983).
28. Wynn & Anderson, *supra* note 2, at 12.
29. *See infra* notes 73-120 and accompanying text.
30. *See infra* notes 113-23 and accompanying text.
31. *See infra* notes 73-120 and accompanying text. Defense attorneys are not the only group likely to feel the economic impact of the 1984 amendments. When the attorney is not paid, those employed by the attorney for investigative and forensic purposes will find their fees difficult to collect. The threat of fee forfeiture may make obtaining private expert services difficult for the RICO defense attorney in the future. Conversation with Dr. P. Cashman, Professor of Criminalistics, California State University, Sacramento (February 15, 1986) (notes on file at *Pacific Law Journal*).
32. *See infra* notes 73-120 and accompanying text.
33. Telephone conversation with A. J. Kramer, Esq. defense attorney for San Francisco Federal Defender's Office (February 28, 1986) (notes on file at *Pacific Law Journal*). The average RICO case requires six to twelve months to adjudicate. *Id.*
34. *Digest of RICO Investigations, supra* note 5, at 126.
35. A majority of the counts resulted in a hung jury. Subsequently, another indictment was handed down in 1980. Essentially the defense attorneys were required to begin the process a second time, accumulating many more hours of work. *Id.*
36. Telephone conversation with A. J. Kramer, Esq. *supra* note 33.

Attorneys defending RICO defendants expend valuable time and energy and may never be compensated for their work. Defense counsel, who suffers only economic loss, is not the only victim if fees are considered forfeitable. The RICO defendant is subjected to a much more significant injustice, the impairment of the sixth amendment right to counsel.[37]

This comment will examine some inequities defendants indicted under RICO will suffer if attorneys' fees are subject to forfeiture.[38] Initially, the pertinent provisions and new amendments of RICO will be discussed in detail.[39] Second, the process by which innocent third parties can protect their interests in forfeitable property will be explored.[40] In particular, consideration will be given to how this process relates to attorneys.[41] Next, a detailed analysis will be made of three conflicting federal cases dealing with the issue of forfeiture of attorneys' fees.[42] Finally, this comment will show how forfeiture of attorneys' fees will violate a RICO defendant's sixth amendment right to counsel.[43] This proposition is divided in two sections.[44] The first section analyzes the defendant's qualified right to choice of counsel.[45] Initially, the traditional situations in which the right to choice of counsel has been denied will be set forth.[46] Next, the RICO setting will be distinguished from situations involving traditional denials of the defendant's right to choice of counsel.[47] This comparison will show that the qualified right to choice of counsel should be upheld in the RICO setting.[48] The second section dealing with the RICO defendant's violated sixth amendment rights explores the conflicts of interest that arise for the RICO defense attorney if fees are forfeitable.[49] These conflicts will ultimately lead to the impingement of a RICO defendant's sixth amendment right to counsel.[50] This comment will conclude with a proposal for modification of RICO legislation to exclude attorneys' fees from forfeiture.[51]

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37. U.S. CONST. amend. VI. "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." *Id.*
38. *See infra* notes 132-245 and accompanying text.
39. *See infra* notes 52-71 and accompanying text.
40. *See infra* notes 72-76 and accompanying text.
41. *See infra* notes 74-120 and accompanying text.
42. *See infra* notes 77-123 and accompanying text.
43. *See infra* notes 132-245 and accompanying text.
44. *See id.*
45. *See infra* notes 132-97 and accompanying text.
46. *See infra* notes 137-60 and accompanying text.
47. *See infra* notes 161-73 and accompanying text.
48. *See infra* notes 161-97 and accompanying text.
49. *See infra* notes 198-251 and accompanying text.
50. *See id.*
51. *See infra* note 248 and accompanying text.

THE 1984 RICO AMENDMENTS

A. The Offense and Forfeiture Provisions

When first enacted, RICO was embodied in Title IX of the Organized Crime Control Act of 1970.[52] In 1984, Congress amended the 1970 Act. The new version is called the Comprehensive Crime Control Act of 1984.[53]

The offense provision[54] of RICO contains a list of state and federal crimes.[55] Under the offense provision, a person committing two

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52. Pub. L. No. 91-452, 84 Stat. 941 (1970).
53. Pub. L. No. 98-473, 98 Stat. 2040, 2192 (1984).
54. 18 U.S.C. § 1962 (1970).
55. *See Digest of RICO Investigations, supra* note 5, at 3. Acts of Racketeering Activity:
    - A) State Crimes - Felonies
        1) Act or threat involving murder
        2) Kidnapping
        3) Gambling
        4) Arson
        5) Robbery
        6) Bribery
        7) Extortion
        8) Dealing - narcotic - dangerous drug.
    - B) Federal Crimes
        1. 18 U.S.C.
            - a) 201 (bribery)
            - b) 224 (sports bribery)
            - c) 471, 472 (counterfeiting)
            - d) 659 (embezzlement from interstate or foreign shipments)
            - e) 664 (embezzlement from pension and welfare fund)
            - f) 891, 892, 893, 894 (extortionate credit transactions)
            - g) 1084 (transmission of gambling information)
            - h) 1341 (mail fraud)
            - i) 1343 (wire fraud)
            - j) 1503 (obstruction of justice)
            - k) 1510 (obstruction of criminal investigation)
            - l) 1511 (obstruction of state or local law enforcement)
            - m) 1951 (Hobbs Act)
            - n) 1952 (interstate and foreign travel or aid of racketeering enterprise)
            - o) 1953 (interstate transportation of wagering paraphernalia)
            - p) 1954 (unlawful welfare fund payments)
            - q) 1955 (illegal gambling businesses)
            - r) 2314 (transportation of stolen goods, securities, moneys, fraudulent state tax stamps or articles used in counterfeiting)
            - s) 2315 (sale of stolen goods)
            - t) 2421, 2422, 2424 (whiteslave traffic)
        2. 29 U.S.C.
            - a) 186 (restrictions on payments and loans to labor organizations)
            - b) 501(c) (embezzlement from union funds)
        3. Bankruptcy frauds including fraud in sale of securities 18 U.S.C. §§ 151-155.
        4. Narcotic and dangerous drug felonies-manufacture, importation, receiving, concealment, buying, selling and dealing.

Id. at 4. 18 U.S.C. § 1962 (1984). *Cf.* CAL. PENAL CODE § 186.2. This California statute is most similar to the federal RICO statute. Offenses within the California provision include the follow-

designated state or federal crimes[56] within ten years is deemed to have undertaken a pattern of racketeering activity.[57] Establishing a pattern of racketeering is a prerequisite for applying the RICO penalty provisions.[58] The 1984 RICO amendments did not alter the offense provision significantly.[59] The forfeiture provision,[60] however, has undergone major innovations.

The forfeiture provision states that any interest a defendant acquires through a pattern of racketeering activity is subject to forfeiture.[61] "Interest" has always been construed to mean direct interest[62] in an enterprise established, operated, controlled, or conducted in violation of the offense provision.[63] A conflict among the Federal Circuit Courts of Appeal regarding whether "interest" also included the proceeds or profits of racketeering activity.[64] The United States Supreme Court resolved the conflict in *Russello v. United States*.[65] The Court declared that any profit derived from racketeering activity is subject to forfeiture under the forfeiture provision.[66] The *Russello* decision was codified in the 1984 amendments.[67] As a result, more of a RICO defendant's property is subject to forfeiture.[68] The forfeiture provision is now

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ing: arson, bribery, felonious assault, embezzlement, extortion, forgery, gambling, kidnapping, mayhem, murder, pimping and pandering, receiving stolen property, robbery, solicitation, grand theft, and trafficking in control substances. *Id.*

56. Any combination of the federal or state crimes is acceptable, i.e., one state and one federal, or two federal, or two state crimes. *Digest of RICO Investigations, supra* note 5, at 3.

57. 18 U.S.C. § 1961(5) (1984). *Cf.* CAL. PENAL CODE § 186.2(a), (b) (California provision uses the term "criminal profiteering activity").

58. 18 U.S.C. § 1963(a) (1984). *Cf.* CAL. PENAL CODE § 186.2(b) (California counterpart).

59. 18 U.S.C. § 1962 (1984).

60. 18 U.S.C. § 1963(a)-(m) (1984).

61. 18 U.S.C. § 1963(a) (1984). *Cf.* CAL. PENAL CODE § 186.3 (California counterpart).

62. *See* United States v. Marubeni American Corp., 611 F.2d 763, 766 (9th Cir. 1980) (held assets subject to forfeiture include only direct interests in racketeering activity and not the proceeds of the activity); United States v. Martino, 681 F.2d 952, 957 (5th Cir. 1982) (allowed forfeiture of both direct assets of racketeering enterprise and its proceeds). Direct interest means something other than *income* derived from a pattern of racketeering activity. *Marubeni*, 611 F.2d at 766; *see also* Russello v. United States, 464 U.S. 16, 19 (1983) (illustration of direct versus indirect interest). An example of the distinction between direct and indirect interest occurs when a RICO defendant has obtained ownership and control over an apartment complex through a pattern of racketeering activity. The apartment building constitutes a direct interest in a racketeering enterprise. The rents obtained from leasing the apartments are an indirect interest of the enterprise. *Id.*

63. 18 U.S.C. § 1963(a)(2)(D) (1984). *See supra* note 55 (statute set forth in pertinent part).

64. *See Marubeni*, 611 F.2d at 768; *Martino*, 681 F.2d at 956.

65. 464 U.S. 16 (1983).

66. *Id.* at 19. 18 U.S.C. § 1963(a)-(m) (1984).

67. *See* 18 U.S.C. § 1963(a)(3) (1984). The amended section provides in part that "any property constituting, or derived from, any *proceeds* which the person obtained, directly or indirectly, from racketeering activity . . . in violation of section 1962" shall be forfeited to the United States. *Id.*

68. *See Russello*, 464 U.S. at 21.

applied broadly to permit governmental seizure not only of assets in an enterprise, but also of any proceeds derived therefrom.[69] An additional consequence is that innocent third parties[70] are affected by the RICO forfeiture provision.[71]

B. *Innocent Third Parties and Subsection (m)*

The 1984 RICO amendments provide a process by which third parties can protect their interests in potentially forfeitable property.[72] Subsection (m) of the forfeiture provision states that property will be excluded from forfeiture if the petitioner was a bona fide purchaser for value of the assets and had no knowledge the property was subject to forfeiture.[73] Problems have recently arisen in the federal district courts, however, concerning the interpretation of subsection (m) and how this provision relates to attorneys' fees.[74] If attorneys representing RICO defendants are not considered bona fide purchasers for value, money intended for payment of their services, or funds already used to pay for fees, would be subject to forfeiture.[75] This

69. *Id.* at 20.

70. Innocent third parties are those claimants to forfeitable property who have no connection with the RICO defendant's illegal activity. *See* United States v. Rogers, 602 F. Supp. 1332, 1346 (D.C. Colo. 1985).

71. *See infra* notes 72-76 and accompanying text; *Russello*, 464 U.S. at 20.

72. *See* 18 U.S.C. § 1963(m) (1984). This section provides in pertinent part:

> (2) any person, other than the defendant asserting a legal interest in property which has been ordered forfeited to the United States pursuant to this section may . . . petition the court for a hearing to adjudicate the validity of his alleged interest in the property. The hearing shall be held before the court alone, without a jury . . . .
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> . . . .
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> (5) At the hearing, the petitioner may testify and present evidence and witnesses on his own behalf, and cross-examine witnesses who appear at the hearing. The United States may present evidence and witnesses in rebuttal and in defense of its claim to the property and cross-examine witnesses who appear at the hearing. In addition to testimony and evidence presented at the hearing, the court shall consider the relevant portion of the record of the criminal case which resulted in the order of forfeiture.
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> (6) If, after the hearing, the court determines that the petitioner has established by a preponderance of the evidence that-
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> (A) the petitioner has a legal right, title, or interest in the property, and such right, title, or interest renders the order of forfeiture invalid in whole or in part because the right, title, or interest was vested in the petitioner rather than the defendant at the time of the commission of the acts which gave rise to the forfeiture of the property under this section; or
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> (B) the petitioner is a bona fide purchaser for value of the right, title, or interest in the property and was at the time of the purchase reasonably without cause to believe that the property was subject to forfeiture under this section; the court shall amend the order of forfeiture in accordance with its determination . . .

Id. Compare 18 U.S.C. § 1963(m) (1984) *with* CAL. PENAL CODE §§ 186.7(b), 186.8(a) (these sections provide third party remedies similar to RICO § 1963(m)).

73. 18 U.S.C. § 1963 (m)(6)(B) (1984).

74. *See supra* notes 77-123 and accompanying text.

75. *See* United States v. Payden, 605 F. Supp. 839, 849 n.14 (S.D.N.Y. 1985).

construction would seriously interfere with several aspects of the sixth amendment right to counsel.[76] An examination of three 1985 federal district court cases will clarify the conflicting opinions interpreting bona fide purchasers.

JUDICIAL CONSIDERATION OF FORFEITURE OF ATTORNEYS' FEES

A. United States v. Rogers

In *United States v. Rogers*,[77] the defendant was indicted under RICO for mail fraud, racketeering, and the filing of fraudulent tax returns.[78] Consequently, the government filed for forfeiture of the defendant's profits under subsection (m).[79] Counsel for the defendant moved to exclude attorney fees and costs from forfeiture, claiming that the forfeiture provision does not provide for the seizure of assets transferred to attorneys for the performance of legitimate services.[80] The federal district court of Colorado held that an attorney who receives fees for services rendered pays value because the lawyer devotes time, skill, and effort for the client's cause.[81] The *Rogers* court also focused upon whether RICO defense attorneys have reasonable cause to believe the assets used by defendants for fee payment may be subject to forfeiture.[82]

Although cases decided prior to the 1984 amendments have held that knowledge of indictment and of the government's claim to forfeiture is sufficient notice to a RICO defense attorney,[83] the *Rogers* court did not consider these decisions controlling.[84] Instead, the court focused upon the critical question of what property is subject to forfeiture under the RICO forfeiture provision.[85] The forfeiture provision describes in detail the property eligible for potential forfeiture.[86]

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76. *See infra* notes 132-251 and accompanying text.
77. 602 F. Supp. 1332 (D.C. Colo. 1985).
78. *Id.* at 1334.
79. *Id.*
80. *Id.*
81. *Id.* at 1346.
82. *Id.*
83. *See* United States v. Raimondo, 721 F.2d 476, 478 (4th Cir. 1983); United States v. Long, 654 F.2d 911, 917 (3d Cir. 1981).
84. *See Rogers*, 602 F. Supp. at 1346-47.
85. *Id.* at 1347.
86. *See* 18 U.S.C. §§ 1963(a), (b) (1984). These sections provide in pertinent part:
(a) Whoever violates any provision of section 1962 of this chapter shall . . . forfeit to the United States irrespective of any provision of state law-
(1) any interest the person has acquired or maintained in violation of section 1962;
(2) any-
(A) interest in;

Property eligible for forfeiture includes assets possessed or controlled by the defendant.[87] The provision does not, however, define specifically which assets, once transferred to third parties, are subject to forfeiture.[88] The court reasoned that Congress must have intended different treatment of assets transferred to third parties as compared with assets in the hands of the defendant.[89] Otherwise subsection (m), specifically dealing with third party assets, would be meaningless surplusage within the 1984 amendments.[90]

Since the forfeiture provision does not address whether attorneys' fees are forfeitable, the court in *Rogers* turned to the legislative history of the 1984 amendments for guidance.[91] The Senate Report on subsection (m) indicates that only assets transferred to third parties as some type of sham or artifice are forfeitable.[92] Attorneys who render bona fide services engage in neither a fraud nor sham.[93] The transfer of fees is an arm's length transaction and is not used to avoid the forfeiture sanction.[94]

The *Rogers* court also looked beyond the specific legislative history of the 1984 RICO amendments to find that Congress recognized the need to ensure the right to counsel in the context of third party forfeiture of assets.[95] The court compared the Comprehensive Drug Abuse Prevention and Control Act of 1970[96] to the RICO provisions.[97]

(B) security of;
(C) claim against; or
(D) property or contractual right of any kind affording a source or influence over; any enterprise which the person has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962; and

(3) any property constituting, or derived from, any proceeds which the person obtained, directly or indirectly, from racketeering activity or unlawful debt collection in violation of section 1962.

(b) Property subject to criminal forfeiture under this section includes-

(1) real property, including things growing on, affixed to, and found in land; and

(2) tangible and intangible personal property, including right, privileges, interest, claims, and securities.

Id.

87. *See id.*
88. *Rogers*, 602 F. Supp. at 1347.
89. *Id.*
90. *Id.*
91. *Id.*
92. S. REP. No. 225, 98th Cong., 2d Sess. 9 (1984). The report stated: "The provision should be construed to deny relief [only] to third parties . . . who have knowingly engaged in sham or fraudulent transactions." *Id.*
93. *Rogers*, 602 F. Supp. at 1347.
94. *Id.*
95. *Id.*
96. 21 U.S.C. §§ 801-969 (1970).
97. *See Rogers*, 602 F. Supp. at 1347.

The forfeiture provisions of the two statutes are very similar, both in the content and the goals sought to be achieved.[98] The objective of each act is to recover the profits resulting from the criminal activity.[99] Regarding the Comprehensive Drug Abuse Prevention and Control Act, the House Judiciary Committee stated that "nothing in this section dealing with . . . forfeiture is intended to interfere with a person's sixth amendment right to counsel."[100] A threat of pretrial forfeiture of attorneys' fees *would*, however, make retention of counsel of choice difficult for a RICO defendant.[101] In addition, impending forfeiture would give rise to serious ethical conflicts between the attorney and the client after retention.[102] Both the interference with retention of counsel of choice and the creation of ethical conflicts impede a defendant's sixth amendment right to counsel.[103] The court in *Rogers* did not confront the sixth amendment issue squarely.[104] This issue, however, has been addressed by other courts.

B. United States v. Badalamenti

In *United States v. Badalamenti*, a federal district court for the southern district of New York also supported nonforfeiture of attorneys' fees.[105] The court stated that forfeiture of legal fees paid to a RICO defense attorney would create major constitutional and

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98. *Rogers*, 602 F. Supp. at 1347.
99. *Id.*
100. H.R. REP. No. 845, 98th Cong., 2d Sess. 19 n.1 (1984).
101. *See* United States v. Badalamenti, 614 F. Supp. 194, 197 (S.D.N.Y. 1985).
102. *Id.* at 196; *see infra* notes 198-251 and accompanying text.
103. *See infra* notes 132-251 and accompanying text.
104. The *Rogers* court suggested another theory on which nonforfeiture of attorneys' fees may be based. *See Rogers*, 602 F. Supp. at 1348 n.5; United States v. Ray, 731 F.2d 1361 (9th Cir. 1984). In *Ray*, the defendant's property was subject to forfeiture and the court imposed a pretrial restraining order on the assets. *Id.* at 1365. The restraining order, however, excluded expenditures for the necessities of life. *Id.* The court in *Rogers* suggested that while representation by counsel may not "in the common sense meaning of the word, be considered a 'necessary' like food or shelter," attorneys' fees have been considered necessities in some legal contexts. *Rogers*, 602 F. Supp. at 1348 n.5. *See, e.g., In re* Ricky H., 2 Cal. 3d 513, 521, 86 Cal. Rptr. 76, 80, 468 P.2d 204, 208 (1970); Wolf v. Friedman, 20 Ohio St. 2d 49, 253 N.E.2d 761, 767 (1969). *But see* United States v. Gody, 678 F.2d 84, 85 (9th Cir. 1979). The district court wanted to exclude two of six pieces of defendant's property from forfeiture. The defendant's wife had just given birth and the court felt some source of family support should be provided. The Ninth Circuit disagreed, however, and held all of the property forfeitable. *Id.*
105. *Badalamenti*, 614 F. Supp. at 195-98. Defense counsel was served with a subpoena *duces tecum* by the government. *Id.* at 195. The government sought to obtain two types of information pursuant to the subpoena procedure. First, the government wanted to show that since the defendant possessed such a large amount of money to pay attorneys' fees, believed to be in the vicinity of $500,000, evidence existed to help prove involvement of the accused in narcotics trafficking. *Id.* Second, after dicovering the exact amount paid in fees, the government would then seek to seize this amount under the RICO forfeiture provision. *Id.*

ethical problems, a result Congress could not have intended.[106] Application of the forfeiture provision to attorneys' fees would violate the sixth amendment right to counsel by making the possibility of obtaining an attorney difficult.[107] The likelihood that private defense counsel cannot be retained arises when a pre-trial restaining order has not been placed on a defendant's potentially forfeitable property.[108] The defendant retains control over the assets and, therefore, cannot declare indigency and acquire appointed counsel.[109] Conversely, private counsel will not represent RICO defendants if a threat of

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106. *Id.* at 196. "Absent some supporting indication in the legislative history, I think it most doubtful that Congress can have intended by its broad language to cover a special application so clearly at odds with an accused defendant's constitutionally guaranteed right to have counsel defend the charge." *Id.* at 197. The sixth amendment was not the only constitutional issue dealt with by the *Badalamenti* court. The court also addressed the constitutional ramifications of the subpoena action of the court on the attorney-client privilege, the defendant's privilege against self-incrimination, the defense attorney's privilege against self-incrimination, and the defendant's right to redress a grievance under the first amendment. *Id.* at 196-202.

107. *Id.* at 197.

> If the statute applies to [the defense attorney], its message to him is "Do not represent this defendant or you will lose your fee." That being the kind of message lawyers are likely to take seriously, the defendant will find it difficult or impossible to secure representation. By the Sixth Amendment we guarantee the defendant the right of counsel, but by the forfeiture provisions of . . . RICO . . . (if they apply to the fee of the defense attorney), we insure that no lawyer will accept the business.

Id. at 196.

108. *Id.* at 197. *See also* 18 U.S.C. 1963(e) (1984) (pretrial restraining order of RICO). The restraining provision states in pertinent part:

> (e)(1) Upon application of the United States, the court may enter a restraining order . . . to preserve the availability of property described in subsection
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> (a) for forfeiture under this section-
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> (A) upon the filing of an indictment or information charging a violation of section 1962 of this chapter and alleging that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section; or
>
> (B) prior to the filing of such indictment or information, if, after notice to persons appearing to have an interest in the property and opportunity for a hearing, the court determines that-(i) there is a substantial probability that the United States will prevail on the issue of forfeiture and that failure to enter the order will result in the property being destroyed, removed from the jurisdiction of the court, or otherwise made unavailable. . . .

Id. Badalamenti takes a slightly narrower approach to forfeiture of attorneys' fees than does *Rogers*. The *Rogers* court stated that forfeiture of attorneys' fees is not prescribed by RICO under any circumstances. *See Rogers*, 602 F. Supp. at 1348-51. The *Badalamenti* court, however, took the position that if a pretrial restraining order is placed on a defendant's assets pursuant to the restraining provision, the sixth amendment right to counsel is not violated. *Badalamenti*, 614 F. Supp. at 197. The defendant receives appointed counsel, by claiming indigency, although not counsel of choice. The problem arises when a pretrial restraining order has *not* been placed on the defendant's property. The defendant can freely use the potentially forfeitable assets to retain counsel. Since the possibility of forfeiture still exists as to this money, however, lawyers will refuse to take the chance of representing the RICO defendant. The defendant "can get neither a paid lawyer, nor a free one." In this regard the sixth amendment is violated. *Id.*

109. *Badalamenti*, 614 F. Supp. at 197.

fee forfeiture exists upon the client's conviction.[110] Both *Rogers* and *Badalamenti* construed legislative history as forbidding the forfeiture of attorneys' fees.[111] Unlike *Rogers*, the *Badalamenti* court based the nonforfeiture construction on a sixth amendment basis.[112] In 1985, another federal district court in New York disagreed sharply with *Rogers* and *Badalamenti* and held that forfeiture of attorneys' fees under RICO did not violate the sixth amendment.

C. Payden v. United States

In *Payden v. United States*,[113] the court stated that a RICO defense attorney has knowledge of information in the indictment and, therefore, counsel receives funds with the knowledge that the money is subject to forfeiture.[114] As a result, the attorney cannot qualify under subsection (m) to retain an interest in fees paid from money subject to the forfeiture provision.[115] Counsel has not entered into an arm's length transaction.[116] The Court held that an attorney knows in advance the government may obtain superior title and, therefore, assumes the risk that fees may be forfeited.[117]

The *Payden* court also expressed concern that if attorneys' fees are exempt from forfeiture, lawyers may become conduits for laundering racketeer profits.[118] The court examined a report from the President's Commission on Organized Crime, which revealed that a small group

110. *Id.* at 197-98.

111. *Badalamenti*, 614 F. Supp. at 197; *see supra* notes 95-100, 106 and accompanying text.

112. *Badalamenti*, 614 F. Supp. at 197-98.

113. 605 F. Supp. 839 (S.D.N.Y. 1985). The facts of *Payden* are very similar to the situation in *Badalamenti*. Defendant Payden was indicted under RICO for maintaining a continuing criminal narcotics enterprise. *Id.* at 844. The government sought forfeiture of all profits and proceeds from the enterprise including cash seized from Payden's home, a 25% interest in a company as represented by shares of stock, an automobile, and jewelry. *Id.* Payden's attorney was served with a subpoena *duces tecum*. *Id.* at 845. The government sought to obtain fee information pursuant to the subpoena. *Id.* The fee information would help prove receipt by Payden of substantial profits from narcotics trafficking. The defendant sought to quash the subpoena on grounds that his sixth amendment right to effective assistance of counsel and his fifth amendment right to be free from grand jury abuse were violated. *Id.* at 844-45.

114. *Id.* at 849 n.14.

115. *See id.* "The court has little sympathy for transferees in this group even though the results of forfeiture may be harsh." *Id.*

116. *Id.* Arm's length transaction is used by the *Rogers, Payden*, and *Badalamenti* courts to include dealings between an attorney and a client that are entirely legitimate and legal as opposed to an attorney-client transaction that is in some way an artifice or sham. An example of an illegitimate attorney-client transaction is one in which the client transfers funds to an attorney in the form of fees but with the intention of escaping forfeiture of those funds. *See Payden*, 605 F. Supp. at 849 n.14; *Badalamenti*, 614 F. Supp. at 198; *Rogers*, 602 F. Supp. at 1342. "An attorney who receives funds in return for services legitimately rendered operates at arm's length and not as part of an artifice or sham to avoid forfeiture." *Id.*

117. *Payden*, 605 F. Supp. at 849 n.14.

118. *See id.* at 850 n.14.

of lawyers have become "critical elements in the life support system of organized crime."[119] An exemption for attorneys' fees would undermine the purpose of forfeiture statutes, which is to strip economic power from offenders.[120]

The sixth amendment right to counsel issue was addressed briefly in *Payden*.[121] The court construed the legislative history of the forfeiture provision as allowing the courts to decide if forfeiture of fees did or did not violate the sixth amendment right to counsel.[122] The court resolved the issue by declaring that retention of assets intended for attorneys' fees under the forfeiture provision did not effect a violation of the sixth amendment right to counsel.[123]

D. *Discontent in the Federal District Courts*

The *Badalamenti, Rogers*, and *Payden* decisions represent the extremes in the controversy over forfeiture of attorneys' fees. Each side of the controversy advances strong reasons in support of its respective position on forfeiture or nonforfeiture. The courts in *Badalamenti* and *Rogers* reasoned that when fees are forfeitable, too many ethical conflicts exist for forfeiture to pass constitutional muster.[124] Furthermore, the legislative history of the 1984 RICO amendments does not indicate that Congress intended forfeiture.[125] The *Payden* Court, alternatively, took a dim view of RICO defendants and defense attorneys and supported forfeiture of fees as an effective means to dislodge

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119. *Id. See also, Lawyers Called Organized Crime "Life Support,"* N.Y.L.J., March 11, 1985, at 1, col. 5. An attorney who represented members of La Cosa Nostra for more than ten years provided extensive information to the Commission. The attorney estimated that there are thirty lawyers, like himself, who help organized crime to effectively operate. The La Cosa Nostra attorney admitted that his office was routinely utilized for family business because the office was less likely a target of electronic surveillance by law enforcement. As a result of the study, the Commission's staff has recommended that the U.S. Justice Department routinely inquire into the sources of attorneys' fees during pretrial discovery. *Id.*

120. *Payden*, 605 F. Supp. at 850 n.14.

121. *See Payden*, 605 F. Supp. at 850 n.14.

122. *Id.* at 850. "Congress intended not to resolve the sixth amendment conflict through this legislation, but to leave the resolution of these issues to the court." *Id.* at 850 n.14. *But see Rogers*, 602 F. Supp. at 1347.

123. *Payden*, 605 F. Supp. at 850 n.14. The court merely noted several disciplinary rules prohibiting lawyers from becoming involved in cases which may impair professional judgment. "Fees paid to attorneys cannot become a safe harbor from forfeiture of the profits of illegal enterprises." Additionally, the court reasoned that merely because a defendant's attorney is compelled to disclose fee information, sixth amendment rights have not been impaired. *Id.* The information is not privileged, and, even if incriminating, the attorney can still effectively prepare for trial and capably represent the client. *Id.* at 847. *But see supra* note 112 and accompanying text.

124. *See Rogers*, 602 F. Supp. at 1350; *Badalamenti*, 614 F. Supp. at 196-97.

125. *Rogers*, 602 F. Supp. at 1347.

the economic base from organized crime.[126] Through the interpretation of the same legislative history used by *Rogers* and *Badalamenti*, *Payden* employed judicial discretion to find an absence of any sixth amendment violation.[127]

The controversy over forfeiture of fees has not been resolved by the United States Supreme Court. Until the conflict regarding forfeiture of fees under the 1984 amendments is resolved, the defense bar will be faced with a difficult dilemma. If counsel chooses to represent a RICO defendant, attorneys' fees ultimately may be forfeited.[128] Alternatively, the attorney may avoid potential forfeiture by compromising the interests of the client and the legal profession.[129] Notwithstanding the attorney's decision, serious ethical considerations arise.[130] Furthermore, the RICO defendant faces grave consequences when attorney fees are forfeitable.[131] In particular, forfeiture of fees violates the sixth amendment by effectively preventing the accused from exercising the qualified right to choice of counsel.

The Qualified Right to Choice of Counsel

Under the restraining provision of RICO the United States may obtain a restraining order to ensure against the destruction or disappearance of forfeitable property.[132] If a restraining order on assets is obtained, a RICO defendant may not have sufficient funds to retain counsel.[133] Insufficient funds with which to retain counsel leads to two possible consequences. First, a defendant may be forced to proceed without counsel, resulting in a blatant violation of the sixth amendment.[134] Forcing a defendant to proceed to trial without counsel, however, is not likely to occur.[135] Second, a more frequent consequence is that a RICO defendant must accept an appointed federal defender, rather than retain an attorney of choice.[136] The second outcome significantly interferes with a defendant's right to choice of counsel.

126. *See Payden*, 605 F. Supp. at 850 n.14.
127. *Id.* at 849 n.14.
128. *See supra* notes 113-22 and accompanying text.
129. *See infra* notes 198-251 and accompanying text.
130. *See id.*
131. *See infra* notes 132-251 and accompanying text.
132. *See* § 1963(e)(1) (1984). *See supra* note 107 (statute set forth in pertinent part).
133. *See Badalamenti*, 614 F. Supp. at 197.
134. *See* U.S. Const. amend. VI. "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." *Id.*
135. *See supra* note 134 and accompanying text (precisely because forcing a criminal defendant to trial without counsel is so blatant a violation of the sixth amendment, no court would allow the occurance to take place).
136. *See Rogers*, 602 F. Supp. at 1349.

A. Traditional Situations When the Qualified Right to Choice of Counsel is Denied

A defendant's sixth amendment right to counsel includes the right to select counsel of one's choice.[137] A defendant's right to choice of counsel, however, is not absolute.[138] Several situations give rise to societal interests that outweigh a defendant's right to choice of counsel. The court may insist, for example, that counsel be authorized to practice law in the state.[139] In addition, under appropriate circumstances, the court may restrict a defendant's right to choice of private counsel due to scheduling constraints of the court.[140] The right to counsel of choice may not be insisted upon at the expense of the power of the court to ensure the orderly disposition of the court docket.[141]

Denial of a defendant's choice of counsel right is illustrated in *United States v. Inman*.[142] The Federal Court of Appeals for the Fifth Circuit held that refusing to grant a continuance to the defendant for purposes of changing counsel was within the discretion of the court.[143] The defendant in *Inman* was assigned appointed counsel by the court. Just seven days before trial, however, the defendant obtained funds

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137. Chandler v. Fretag, 348 U.S. 3, 9 (1954); *In re* Grand Jury Subpoena, 759 F.2d 968, 972 (2d Cir. 1985). "It therefore follows that in assuring a meaningful defense, and in the preparatory stages long before trial, an accused has the fundamental right to be represented by counsel of his own choice." Powell v. Alabama, 287 U.S. 45, 53 (1932); *see also* United States v. Flanagan, 679 F.2d 1072, 1075 (3d Cir. 1982), *rev'd on other grounds*, 465 U.S. 259 (1984). "The right to be represented by counsel of one's choosing has long been regarded as part and parcel of the 'fundamental' right to be heard through counsel." United States v. Curcio, 694 F.2d 14, 22 (2d Cir. 1982). "And we have consistently said that a defendant who retains counsel has a right 'of constitutional dimension' to the counsel of his choice." *Curcio*, 694 F.2d at 23; *See* United States v. Sheiner, 410 F.2d 337, 342 (2d Cir. 1982), *cert. denied*, 396 U.S. 825 (1969); United States v. Wisniewski, 478 F.2d 274, 285 (2d Cir. 1973). "There can be no doubt that a defendant in a criminal case is entitled to counsel of his own choice to assist in his defense." Smith v. United States, 216 F.2d 724, 726 (5th Cir. 1954).

138. Gandy v. Alabama, 569 F.2d 1318, 1323 (5th Cir. 1978). "[I]t is a settled principle that the right to counsel of one's choice is not absolute as is the right to assistance of counsel." *Id.* United States v. Gray, 565 F.2d 881, 887 (5th Cir. 1978); *Sheiner*, 410 F.2d at 342. While not absolute, this right "should not be unnecessarily obstructed by the court." *Id.* "The sixth amendment guarantee of effective assistance of counsel does not provide defendants with an absolute right to the lawyer of their choice." Davis v. Stamler, 650 F.2d 477, 479 (3d Cir. 1981); United States v. Dolan, 570 F.2d 1177, 1183 (3d Cir. 1978); Urquhart v. Lockhark, 726 F.2d 1316, 1319 (8th Cir. 1984). "While it is clear that an accused who is financially able to retain counsel of his own choosing must not be deprived of a reasonable opportunity to do so, it is also clear that the right to retain counsel of one's choice is not absolute." *Id.* United States v. Burton, 584 F.2d 485, 489 (2d Cir. 1978).

139. W. LaFave, J. Israel, Criminal Procedure § 11.4 (1985).

140. *See infra* notes 141-57 and accompanying text.

141. United States v. Lee, 235 F.2d 219, 221 (4th Cir. 1956); Smith v. United States, 288 F. 259, 261 (2d Cir. 1923).

142. 483 F.2d 738 (1973).

143. *Id.* at 740.

with which to hire private counsel.[144] The request for a continuance in order for the newly employed attorney to prepare for trial was denied.[145] The trial judge ordered defendant's appointed counsel to continue to represent the defendant.[146] The federal court reasoned that the defendant's sixth amendment right included a reasonable opportunity to obtain counsel of one's own choosing. This right may not, however, be exercised at a point in the proceedings when the timely scheduling of cases would be upset.[147]

A court may also deny the right to choice of counsel when a defendant has already obtained private counsel.[148] This situation frequently arises when retained counsel suddenly becomes ill[149] or must participate in another case scheduled at the same time.[150] In these circumstances, the defendant is prompted to request a continuance.[151] Provided adequate counsel is available a court may insist that the case proceed as scheduled with another attorney.[152] Therefore, a defendant's right to choice of counsel may be subverted when a balancing test reveals that the societal interest of prompt and efficient administration of justice outweighs the defendant's interest in choosing an attorney.[153]

Instances may arise when a defendant attempts to use the right to choice of counsel to achieve a tactical advantage.[154] The accused may request a continuance, alleging an exercise of the right to choice of counsel.[155] In reality, however, the defendant is trying to achieve a delay in the trial which will result in the unavailability of prosecution witnesses.[156] If a court detects that strategic manipulation is the motive

144. *Id.* at 739.
145. *Id.*
146. *Id.*
147. *Id.* at 740; *see also Burton*, 584 F.2d at 490. "The condition of most criminal dockets demands reasonably prompt disposition of cases; when cases are set far in advance for a day certain, an unreasonable delay in one case only serves to delay other cases, and this carries the potential for prejudice to the rights of other defendants." *Id.* The scheduling of cases critically affects the availability of prosecution witnesses. *Gandy*, 569 F.2d at 1324 n.9. "That delays and postponement only increase the reluctance of witnesses to appear in court . . . is a phenomenon which scarcely needs elucidation." Accommodation of one defendant may prejudice other defendants. "Played to an extreme conclusion, this indiscriminate game of judicial musical chairs could collapse any semblance of sound administration. . ." *Id.*
148. *See* Slappy v. Morris, 649 F.2d 718, 719 (9th Cir. 1981); *Gandy*, 569 F.2d at 1320.
149. *Slappy*, 649 F.2d at 719.
150. *Gandy*, 569 F.2d at 1320.
151. *See Slappy*, 649 F.2d at 719; *Gandy*, 569 F.2d at 1319.
152. United States v. Ramey, 539 F. Supp. 60, 63 (E.D. Tenn. 1981); *see Burton*, 584 F.2d at 498.
153. Ungar v. Sarafite, 376 U.S. 575, 591 (1964).
154. *See Gandy*, 569 F.2d at 1323.
155. *Id.*
156. *Id.* at 1324 n.9.

behind the exercise of the right, the court has discretion to deny the qualified right to choice of counsel.[157]

Should a RICO defendant request a continuance the court must balance the defendant's right to choice of counsel against the public interest in the orderly administation of justice.[158] Accordingly, if the balance is struck in favor of the public interest, the defendant's right to choice of counsel will be denied.[159] The RICO defendant, however, will generally seek to exercise the right to choice of counsel at an earlier point in the proceedings.[160]

B. Choice of Counsel in the RICO Setting

A mechanical test does not exist for determining when a defendant's right to choice of counsel should be denied.[161] The decision requires a balancing test that analyzes the circumstances of each particular case.[162] The factors that must be considered in determining whether a defendant should be granted a continuance in order to exercise the right to choice of counsel include: (1) whether the request came at a point sufficiently in advance of trial to permit the trial court to adjust the court calendar; (2) the length of the continuance requested; (3) whether the continuance would seriously inconvenience witnesses, litigants, opposing counsel, and the court; and (4) whether the requested delay is for a legitimate reason or is dilatory and contrived.[163] When these factors are applied to the RICO setting, the balance weighs in favor of allowing the defendant to exercise the right to choice of counsel.[164]

Traditionally, courts have denied the right to choice of counsel *only* when the orderly administration of justice would be impaired by allow-

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157. *Id.* at 1323. "It is a right and a proper tool of the defendant; it cannot be used merely as a manipulative monkey wrench." *Id.* "A defendant cannot assume the right to choose counsel affords the right to obtain a delay at his whim and caprice, or to obtain a reversal because he was unable to frustrate justice." United States v. Grow, 349 F.2d 182, 210 (4th Cir.), *cert. denied*, 393 U.S. 840 (1968). "Rather, the proper exercise of the trial court's discretion requires a delicate balance between a defendant's . . . right to adequate representation by counsel of his choice and the general interest in the prompt and efficient administation of justice." *Gandy*, 569 F.2d at 1323.

158. Linton v. Perini, 656 F.2d 207, 209 (6th Cir. 1981), *cert. denied*, 454 U.S. 1162 (1982).

159. *See supra* notes 140-57 and accompanying text.

160. Telephone conversation with A. J. Kramer, Esq., *supra* note 33.

161. *Sarafite*, 376 U.S. at 589.

162. *Id. See also* Torres v. United States, 270 F.2d 252, 254 (9th Cir. 1959); United States v. Arlen, 252 F.2d 491, 494 (2d Cir. 1958).

163. *Gandy*, 569 F.2d at 1324. *See* Giacalone v. Lucas, 445 F.2d 1238, 1240 (6th Cir. 1971) (court used same factors as *Gandy*). *See also* W. LaFave, J. Israel, Criminal Procedure § 11.4 (1985).

164. *See infra* note 170 and accompanying text.

ing the defendant to exercise the right.[165] In addition, the orderly administration of justice has been deemed impaired only when the following two facts coexist: (1) the defendant requests a continuance in order to exercise the right; and (2) the continuance is requested shortly before trial or while the trial is in progress.[166] In RICO prosecutions, neither of these factors is generally present.[167] The complexity of RICO cases prompts defendants to employ counsel well in advance of trial.[168] Consequently, continuances are not required before or during trial pursuant to the exercise of the right to choice of counsel in the RICO setting. Furthermore, when the factors in the traditional balancing test[169] are applied, they weigh in favor of permitting the RICO defendant to use the right to choice of counsel.[170] The utilization of the right by a RICO defendant most often occurs at a point sufficiently in advance of trial to permit the court to adjust the court calendar.[171] As a result, witnesses, litigants, opposing counsel, and the court are not inconvenienced.[172] Therefore, the exercise of the right to choice of counsel by a RICO defendant will not obstruct the orderly procedure of the courts or interfere with the fair administration of justice.[173]

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165. *See Sarafite*, 376 U.S. at 575.

166. *See Gandy*, 569 F.2d at 1320 (defendant moved for a continuance on the day trial was scheduled to begin in order for counsel of choice to be present); *Inman*, 483 F.2d at 739 (defendant requested continuance seven days before trial in order for recently retained counsel to prepare); *Ramey*, 559 F. Supp. at 62 (defendant wanted to substitute counsel less than two weeks prior to narcotics case); *Burton*, 584 F.2d at 488 (defendant requested a 30 to 60 day continuance in 28 count narcotics case on the day of trial in order to replace counsel).

167. *See Payden*, 605 F. Supp. at 844-45. Counsel began to represent defendant on September 19, 1984. On January 3, 1985 counsel was served with a subpoena *duces tecum*. At this point the trial was not scheduled to begin for some time. The defendant had exercised his right to choice of counsel at least four months before the trial was scheduled to begin. A continuance was not required in order to exercise the right. *Id.* United States v. Bello, 470 F. Supp. 723, 723-24 (1981). The defendant was indicted under RICO on April 18, 1979. Private counsel was retained in "mid-April." *Id.* Generally, RICO cases are scheduled for trial no less than ninty to 120 days after indictment. *See Rogers*, 602 F. Supp. at 1350. In addition, some RICO defendants have attorneys on a continual retainer. This allows counsel to begin working on a RICO case well in advance of trial and no continuance is necessary in order to exercise the right to choice of counsel. *See Lawyers Called Organized Crime "Life Support," supra* note 119.

168. Telephone conversation with A. J. Kramer, Esq. *supra* note 33.

169. *See supra* note 163 and accompanying text (balancing factors presented).

170. In fact, the factors may be inapplicable when the defendant exercises the right absent a request for a continuance, since every factor in the balancing test mentions a continuance. *Id.*

171. *See supra* note 163 and accompanying text (factor 1); *see also supra* notes 167-70 and accompanying text.

172. *See supra* note 163 and accompanying text (factor 4).

173. Use of private counsel instead of a federal defender may speed up the administration of justice in the RICO setting. *See Rogers*, 602 F. Supp. at 1349. "The typical public defender handles far more criminal cases per time unit than does the typical private attorney." Stover & Eckart, *A Systematic Comparison of Public Defenders and Private Attorneys*, 3 AM. J. CRIM. L. 265, 278 (1975). Private counsel often has greater resources and more expertise than some

C. *Weaknesses of the* Payden *Decision*

The *Payden* court stated that society has an interest in precluding a defendant from retaining a skilled attorney with illegally obtained funds.[174] Just as "a defendant cannot obtain a Rolls-Royce with the fruits of a crime, he cannot be permitted to obtain the Rolls-Royce of attorneys from these same tainted funds."[175] The *Payden* court failed to address the more important constitutional interest, namely, the preservation of the right to counsel and any additional implied rights inherent in the right to counsel.[176] Society has a great interest in seeing that these rights are not compromised.[177]

If subsection (m) is used to restrain funds which a defendant intends to use to employ an attorney, the qualified right to choice of counsel *is* compromised.[178] The RICO defendant is denied *any* exercise of the right.[179] The accused never receives the advantage of having a court apply a balancing test to the facts of the case. Rather than applying the long standing balancing test,[180] a blanket, per se rule is applied. Although the right to counsel of one's choice is not absolute, a rule that absolutely denies the right is improper.[181] As the court stated in *United States v. Flanagan*,[182] a defendant's right to choice of counsel should not be dealt with lightly or arbitrarily.[183]

The proposition that appointed counsel is available when money to retain private counsel is seized, does not meet the standards of the *Flanagan* court for dealing with the right to choice of counsel.[184]

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public defenders. *Rogers*, 602 F. Supp. at 1348. The percentage of money awarded to the public defender for fact investigation is minimal and most public defenders feel the inadequacy. Stover & Eckart, *A Systematic Comparison of Public Defenders and Private Attorneys*, 3 AM. J. CRIM. L. 265, 275 (1975). Private counsel may therefore be prepared for trial earlier and require less delay.

174. *See Payden*, 605 F. Supp. at 850 n.14. The societal interest is to deprive offenders and organizations of economic power. The use of tainted funds to obtain the best attorneys results in loss of potentially forfeitable property. The defendant often escapes justice and the economic power remains. *Id.*

175. *Id.*

176. *See Badalamenti*, 614 F. Supp. at 198. "The right to counsel belongs to guilty defendants as well as innocent ones." *Id.*

177. *See Powell*, 287 U.S. at 53.

178. *See Rogers*, 602 F. Supp. at 1348-49.

179. *Id.* at 1348. The "threat of forfeiture . . . prevents [defendants] from using their assets to secure counsel of their choice." *Id.*

180. *Supra* note 163 and accompanying text.

181. *See Sarafite*, 376 U.S. at 386.

182. 679 F.2d 1072.

183. *Id.* at 1076.

184. *Rogers*, 602 F. Supp. at 1349."The impact on the adversary process occasioned by the ability of the government to seize attorney fees is of . . . [great] concern. The retort to the claim of denial of counsel of one's choice, that appointed counsel is available, pays no more than lip service to . . . the right to counsel."*Id.*

This argument also ignores the exigencies of RICO cases.[185] RICO cases are complex. Vast quantities of facts and information must be collected, often involving investigation of several worldwide business enterprises.[186] The prosecution of a defendant under RICO can last as long as two to three years from grand jury investigation to the end of trial.[187] Federal defenders normally are appointed 90 to 120 days prior to trial.[188] Because of the complexity of a RICO case, 90 to 120 days for preparation is inadequate.[189] By assuring that a RICO defendant does not acquire an advantage through use of a private attorney, the government may obtain a tactical advantage.[190] The prosecutor could exclude any private defense counsel determined to be a skilled adversary or threat, by appending a charge of forfeiture to an indictment under RICO.[191] While most prosecutors may act in good faith, the potential for prosecutorial manipulation cannot be ignored.[192]

RICO defendants should be allowed the right to choice of counsel. The accused should be barred from using potentially forfeitable funds only when one of the traditional reasons for denial of the right is present.[193] Trial courts must examine each case individually. Judges should determine, pursuant to a balancing test, whether exercise of the right to choice of counsel will obstruct the procedure in the courts, interfere with the fair administration of justice, or serve as a strategic ploy for the defense.[194] If potential exists for any of these results, the interests of society and judicial economy must prevail.[195] The balancing test in the RICO setting is a sensible alternative to an absolute rule denying a defendant the right to choose counsel. The balancing approach will generally result in allowing the RICO defen-

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185. *Id.*

186. *Id.* A recent RICO case illustrates the national scope of some RICO enterprises. The case involved a thoroughbred horse race-fixing scheme. The defendants bribed jockeys, trainers, horse owners, and track personnel. The outcome of more than 200 thoroughbred races were altered at race tracks in New Jersey, Pennsylvania, Rhode Island, New Hampshire, and Massachusetts. In addition, the defendant had agreements with major bookmakers in New York City and Las Vegas. *Digest of RICO Investigations, supra* note 5, at 26.

187. *Rogers*, 602 F. Supp. at 1350.

188. *Id.*

189. *Id.*

190. *Id.*

191. The court believed this situation would undermine the very nature of the adversary process. *Id.*

192. *Rogers* stated that even the *opportunity* for such abuse cannot be tolerated in the adversary system. *Id.*

193. *See supra* notes 137-60 and accompanying text.

194. *Sarafite*, 376 U.S. at 931; *Gandy*, 569 F.2d at 1323.

195. *See Burton*, 584 F.2d at 490. The court "is free to deny a continuance . . . [if] it reasonably concludes that the delay would be unreasonable in the context of the particular case." *Id.*

dant to exercise the right.[196] The result will not only benefit the accused by preserving sixth amendment rights, but will benefit the courts by saving time[197] and will ensure that the right to counsel is not slowly eroded. Another important advantage of allowing the use of potentially forfeitable funds to retain counsel is that attorneys representing RICO defendants will not be faced with professional conflicts.

RICO Defense Attorney's Conflict of Interest

The attorney who faces the threat that fees may be forfeited will have to deal with several potential conflicts of interest.[198] Three areas affected by a forfeiture of fees construction of the forfeiture provision will be explored: (a) the time and effort an attorney spends on a RICO case,[199] (b) grand jury subpoening of RICO attorneys,[200] and (c) plea bargaining.[201] Investigation into the three areas will illustrate the dilemma faced by RICO defense attorneys if fees are subject to forfeiture. Moreover, the effect of potential conflicts on a defendant's sixth amendment rights will be exposed.

A. Attorney Expenditure of Time and Effort

The possibility exists that an attorney may not expend sufficient time or effort to prepare for a RICO case because of the threat of forfeiture.[202] The *Payden* court, however, held that this conflict does not exist.[203] The canons of professional responsibility require counsel to represent a defendant zealously despite the risk that the attorney may never receive compensation for work performed.[204] However, at-

196. *See supra* note 141 and accompanying text.
197. *See Rogers*, 602 F. Supp. at 1349.
198. For purposes of this comment, conflict of interest does not represent a conflict of interest in the traditional sense (as when an attorney represents two codefendants), but an internal conflict between the attorney's interest in preserving fees and the obligation to represent the client's best interests.
199. *See infra* notes 202-09 and accompanying text.
200. *See infra* notes 210-35 and accompanying text.
201. *See infra* notes 236-45 and accompanying text.
202. *Badalamenti*, 614 F. Supp. at 196.
203. *Payden*, 605 F. Supp. at 850 n.14. Alternatively, the court offered a solution to any potential conflict. The trial could be bifurcated. The defendant would retain or be appointed one lawyer for the trial and a different attorney to represent his interests at a forfeiture proceeding. *Id.*
204. Model Code of Professional Responsibility DR 7-101 (1985); *but see Badalamenti*, 614 F. Supp. at 196. The *Badalamenti* court took the position that forfeiture of attorneys' fees under subsection (m) may result in an automatic violation of another canon of professional responsibility. The RICO defense attorney "might . . . be found to have accepted a contingent fee in a criminal case in violation of DR 2-106(c)," since retention of the fee depends on gaining an acquittal in the client's case. *Id.* "A lawyer shall not enter into an arrangement

torneys sometimes violate their duties despite canons of ethics.[205] The ultimate result of these violations may be the impairment of an otherwise adequate defense strategy.[206] Statutes should not be construed to create conflicts or compromises, which, if undiscovered, would seriously hamper a defendant's right to counsel.[207] If the 1984 RICO amendments are construed to include forfeiture of defense attorneys' fees, the defendant's right to counsel is compromised if counsel expends less than sufficient time and effort on the client's case.[208] This result is contrary to familiar statutory construction.[209]

B. Grand Jury Subpoening of RICO Defense Attorneys

The threat of being subpoenaed before a grand jury also creates conflict for the RICO attorney. An attorney representing a RICO defendant is sometimes subpoenaed before a grand jury to obtain information on the attorney-client fee arrangement.[210] RICO defense

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for, charge, or collect a contingent fee for representing a defendant in a criminal case." MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-106(c) (1985). Contingent fees in criminal cases are a special concern of the law because of "the danger of corrupting justice." Peyton v. Margiotti, 398 Pa. 86, 89, 156 A.2d 865, 867 (1959). This type of arrangement is illegal and void as against public policy. *Id.* MACKINNON, CONTINGENT FEES FOR LEGAL SERVICES 52 (1964) (a Report of the ABA). *See also* Carrington, *The Right to Zealous Counsel*, 1979 DUKE L.J. 1291, 1293 (1979). Another potential problem with contingencey fee arrangements is that such agreements do not always provide incentives to work hard. Counsel who disposes of cases with little time invested can go on to the next case, thereby becoming enriched more quickly. *Id.*

205. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY, Preamble and Preliminary Statement (1985) (code designed in part to judge "transgressors").

206. *See* Carrington, *supra* note 204, at 1292. While the extent which zealous advocacy influences the outcomes of disputes is unknown, "it [is] not unlikely that the degree of influence is in part a product of the degree of effort expended by the advocate." *Id. See also* Stover & Eckart, *A Systematic Comparison of Public Defenders and Private Attorneys*, 3 AM. J. CRIM. L. 265, 275-77 (1975). The importance of factual investigation to trial success is generally accepted. Private attorneys tend to vary the amount of investigation with the client's ability to pay. *Id.*

207. Bernhoz & Herman, *Protecting Innocent Owners from Drug-Related Forfeiture*, 2 INSIDE DRUG LAW 4 (1985). "[A]s a matter of familiar statutory construction, whenever a statute will bear either of two interpretations, one of which avoids any question of constitutionality and the other of which would involve the court in the confrontation of a substantial constitutional question, the former construction is preferred." *Id.* A strong argument in favor of nonforfeiture is made by some courts based on a construction theory. *See* United States v. Rubin, 559 F.2d 975, 991 (5th Cir. 1977). Because forfeiture of an individual's property was unknown to criminal law prior to RICO there is "a need for circumspection." The court stated that when an ambiguity exists in the construction of a criminal statute, any conflict should be resolved in favor of leniency. The court viewed this canon to have particular application to forfeiture statutes. *Id. See also* Berholz & Herman, *Protecting Innocent Owners from Drug-Related Forfeiture*, 2 INSIDE DRUG LAW 3 (1985). "Under well-settled canons of statutory construction, ambiguities in the operation of a statute are to be resolved in favor of an interpretation that favors the interests of equity and avoids injurious consequences." *Id.*

208. *See Badalamenti*, 614 F. Supp. at 196.

209. *See supra* note 207.

210. *See Payden*, 605 F. Supp. at 843; *supra* note 113; *Badalamenti*, 614 F. Supp. at 195; *see supra* note 105 and accompanying text.

attorneys are subpoenaed for two reasons. The first reason is to help prove the government's case against the defendant.[211] Specifically, the information is used to either establish the defendant's receipt of profits from racketeering activity, or to lead to evidence or coconspirators.[212] The second reason for which an attorney may be subpoenaed to discuss the fee arrangement is to discover if the fees were paid out of proceeds subject to forfeiture.[213] The government seeks this information to determine whether the fees themselves are forfeitable.[214] The potential of being subpoenaed creates an ethical conflict for the attorney.

An attorney has an obligation to be well informed of the facts of the client's case.[215] Because of the potential for forfeiture, however, counsel may be discouraged from discovering facts concerning the source of fee payments.[216] Ignorance of these facts ensures that counsel will not reveal fee information during grand jury testimony.[217] As a consequence, fees may be safe from forfeiture.[218]

The conflict between being fully informed of a client's circumstances, but remaining ignorant of the source of payment in order to continue to be a bona fide purchaser, has a serious impact upon another aspect of the sixth amendment right to counsel. The right to counsel includes more than just the right to representation by competent counsel at trial.[219] The right would be without substance if it did not include a meaningful attorney-client relationship.[220] A trusting relationship between client and attorney must be established.[221] Consultation and planning are required to build trust. The benefits derived from a meaningful attorney-client relationship exemplify the necessity of trust to the sixth amendment.[222]

The outcome of a criminal trial often hinges upon the extent to which the defendant is able to communicate the most intimate and embarrassing details of personal life to the attorney.[223] Complete candor

211. *Payden*, 605 F. Supp. at 846.
212. Although the first method leads to various constitutional issues, use of fee information for probative evidential reasons is not within the scope of this comment.
213. *See Badalamenti*, 614 F. Supp. at 195.
214. *Payden*, 605 F. Supp. at 846.
215. *Badalamenti*, 614 F. Supp. at 196.
216. *Id.*
217. *Id.*
218. *Id.*
219. *Slappy*, 649 F.2d at 720.
220. *Id.*
221. *Id.* at 721. The "attorney-client relationship . . . involves not just the casual assistance of a member of the bar, but an intimate process of consultation and planning which culminates in a state of trust and confidence between the client and his attorney." *Id.*
222. *Id.*
223. McKinnon v. State, 526 P.2d 18, 22 (Alaska 1974).

may reveal defenses or mitigating circumstances that otherwise might go undiscovered.[224] In *In re Grand Jury Investigation*,[225] the Third Circuit Court of Appeals declared that the practice of calling a lawyer before a grand jury investigation concerning the attorney's client is disturbing, especially when the government can obtain the information elsewhere.[226] The very presence of the attorney in the grand jury room raises doubts in the client's mind. The defendant may begin to doubt the lawyer's devotion to the client's interests.[227] The resulting distrust can impair or at least impinge upon the attorney-client relationship.[228]

The court in *Slappy v. Morris*[229] agreed with the holding in *In re Grand Jury Investigation*. The *Slappy* court stated that if the defendant loses confidence in counsel's ability to represent the defendant's best interests, the effectiveness of representation at trial is greatly diminished.[230] The defendant may be unwilling to follow the attorney's advice in deciding whether to plead guilty, to testify, to present a defense, and in deciding which witnesses to call.[231] The court in *Payden* was unpersuaded by the *Slappy* and *In re Grand Jury Investigation* arguments. The *Payden* court stated that disclosure by defense counsel of attorney-client communications, even though the communications are adverse to the defendant, does not affect counsel's ability to represent the defendant effectively, as required by the sixth amendment.[232] The *Payden* court appears to have overlooked certain details of the problem.

A meaningful attorney-client relationship gives substance to the defendant's sixth amendment right to counsel.[233] Grand jury questioning of defense counsel about fees is detrimental to this relationship.[234] When an attorney must appear before a grand jury, trust, along with the free and open communication necessary for a successful

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224. *Id.*
225. 412 F. Supp. 943 (E.D. Pa. 1976).
226. *Id.* at 945. The court reiterated the importance of the attorney-client relationship and the need for the relationship's protection. *Id.* at 946. *See also In re* Terkeltoub, 256 F. Supp. 683, 685 (S.D.N.Y. 1966); *In re* Kinoy, 326 F. Supp. 400, 401 (S.D.N.Y. 1970); *In re* Stolar, 397 F. Supp. 520, 524 (S.D.N.Y. 1975) (cases further exemplify the dangers and disadvantages of calling a defendant's lawyer before the grand jury investigating the client).
227. *In re* Grand Jury Investigation, 412 F. Supp. at 946.
228. *Id.*
229. 649 F.2d 718 (9th Cir. 1981).
230. *Id.* at 720.
231. *Id.* at 720-21.
232. *Payden*, 605 F. Supp. at 846.
233. *Slappy*, 649 F.2d at 721.
234. *See In re* Grand Jury Investigation, 412 F. Supp. at 945-46.

attorney-client relationship, often disappears.[235] For this reason, forfeiture of attorneys' fees under subsection (m) should not be allowed.

C. *Plea Bargaining*

Another source of conflict for the RICO defense attorney involves plea bargaining. If attorneys' fees can be forfeited under subsection (m), counsel would have a motive to negotiate a guilty plea that did not involve forfeiture, rather than try the case.[236] The attorney has a motive to avoid expending valuable time and increasing the risk of incurring forfeiture.[237] Plea bargaining is often viewed as an indispensable device necessary to keep the courts from becoming overburdened.[238] Plea bargaining, however, is widely criticized as cheapening and demeaning the entire criminal justice system by transforming what should be a search for truth into a contest of bargaining and skill.[239] A defense lawyer uses bargaining skills in two ways. Initially, the attorney must try to obtain the best possible deal from the prosecutor.[240] Next, defense counsel must convince the client that the deal is in the defendant's best interest.[241] Forfeiture of attorneys' fees would increase the use of plea bargaining.[242]

When attorneys' fees are potentially forfeitable an ulterior motive is added to the bargaining process. Consequently, an already imperfect system would become increasingly flawed by the temptation for attorneys to consider their own interests during the bargaining process.[243] Absent the threat of fee forfeiture an attorney may proceed to trial with a borderline case.[244] Under a forfeiture of fees interpretation of subsection (m), counsel may now bargain with a client's freedom for the sake of a fee.[245]

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235. *Id.*
236. *Badalamenti*, 614 F. Supp. at 196.
237. *Id.*
238. Rubin, *How We Can Improve Judicial Treatment of Individual Cases Without Sacrificing Individual Rights: The Problems of Criminal Law*, 70 F.R.D. 79, 88 (1976).
239. *Id.* at 81.
240. *Id.* at 82.
241. *Id. See also* Parker, *Plea Bargaining*, 1 AM. J. CRIM. L. 187 (1972). "Plea bargaining is not always a 'gentlemen's game' . . . [The plea bargaining] practice lends credibility to the view that our criminal justice system is less an adversary one than a system of brokerage, in which 'ask' and 'bid' quotations are made not in dollars, but in years of men's lives." *Id.* at 203.
242. *See Badalamenti*, 614 F. Supp. at 196. "The statute would give attorneys a motive to negotiate a guilty plea that did not involve forfeiture." *Id.*
243. *See supra* note 242 and accompanying text.
244. *See Badalamenti*, 614 F. Supp. at 196-97.
245. *Id.*

Serious ethical dilemmas are created when the 1984 RICO amendments are construed to include the forfeiture of attorneys' fees.[246] The conflicts these dilemmas cause make the defense of RICO suspects more difficult and less rewarding for the defense attorney.[247] Although counsel suffers an economic and emotional impact, the RICO defendant experiences a greater loss. Specifically, the attorney's interest in protecting forfeitable fees leads to impingement of the defendant's sixth amendment right to counsel.[248] In addition, a defense attorney is tempted to spend less time on a RICO case due to potential forfeiture.[249] The critical attorney-client relationship loses the element of trust, resulting in less effective representation at trial.[250] Finally, plea bargaining is more likely to be engaged in by the attorney to protect fees.[251] The result of these conflicts is a significant compromise of the defendant's interests and the sixth amendment right to counsel. Legislative change is necessary to ensure that these conflicts will not arise.

PROPOSAL

In view of the serious problems created by forfeiture of attorneys' fees under subsection (m), attorneys should be considered bona fide purchasers for value. Whether courts construing the 1984 RICO amendments for the first time will consider attorneys bona fide purchasers remains unclear. As a consequence, subsection (m) should specifically provide for the exclusion of attorneys' fees from forfeiture under subsection (m). The following proposal achieves a balanced result:

> An attorney representing a client for violations of section 1962 may not be subject to the third party forfeiture provision unless the court determines, pursuant to a hearing petitioned for by the government, that the interests of justice require forfeiture.
>
> The court shall allow forfeiture only upon a showing by the government that (a) reasonable cause exists to believe that fees were transferred as part of some artifice or sham, or (b) that nonforfeiture of funds intended for employment of counsel will reasonably cause an interference with the administration of justice or the scheduling of the court docket. If, after notice to the attorney and the defendant and an opportunity for a hearing, the court determines the

246. *See supra* notes 198-242 and accompanying text.
247. *See Badalamenti*, 614 F. Supp. at 196-97.
248. *See infra* notes 198-242 and accompanying text.
249. *See infra* notes 202-09 and accompanying text.
250. *See infra* notes 219-35 and accompanying text.
251. *See infra* notes 236-45 and accompanying text.

government has not satisfied either (a) or (b) above, the court shall enter an order that attorneys' fees shall not be forfeited.

The foregoing proposal would eliminate the constitutional and ethical problems under subsection (m), while preserving the government's interest in attaching fees paid to attorneys who are conduits for organized crime. At the same time, the proposal would preserve the defendant's right to choose counsel under appropriate circumstances. The first sentence of the proposal will make clear to courts that RICO defense attorneys are exempt from third party forfeiture. Thus the conflict that arose in the *Rogers, Payden*, and *Badalamenti* cases will be resolved.

The proposal also allows the government to attach attorneys' fees when justified. The concern of the court in *Payden* that RICO defendants are preserving their assets by disguising the transaction as a fee transfer is addressed. When transformation of property for forfeiture evasion purposes is discovered, the assets will be subject to an immediate restraining order and forfeited upon conviction. The qualified right to choice of counsel problem is also addressed. The proposal assures that a balancing test is applied before the right is subject to divestment. Therefore, no per se rule denying the right to choice of counsel is imposed. Finally, the proposal makes clear that if the government cannot meet its burden under the statute, attorneys' fees shall not be forfeited.

Conclusion

The 1984 amendments to RICO have the potential for creating grave ethical complications for a RICO defense attorney. The changes also impinge upon a RICO defendant's sixth amendment right to counsel. This comment has explored attorney conflicts and potential sixth amendment violations that will result if courts interpret the new forfeiture provisions to include attorneys' fees. The seizure of a defendant's property under the restraining provision will often result in a lack of funds available to the accused for the retention of counsel. This restraint causes an absolute bar to the qualified right to choice of counsel. The threat of forfeiture of fees also produces conflicts of interest which further impair the right to counsel. These conflicts are far reaching. The impact is felt in the areas of plea bargaining and the attorney-client relationship. The conflicts also affect the time and effort exerted in RICO cases by defense counsel. The proposal of this comment provides a remedy for problems faced by RICO defen-

dants while preventing abuse of the rights of the accused. In addition, nonforfeiture of attorneys' fees will rescue RICO defense attorneys from conflicts that ultimately would demean the field of criminal defense.

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