NEW YORK LAW SCHOOL

NYLS Law Review

Volume 34 | Issue 2 Article 4

January 1989

Indirect Deprivation of the Effective Assistance of Counsel: The Prospective Prosecution of Criminal Defense Attorneys for "Money Laundering"

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INDIRECT DEPRIVATION OF THE EFFECTIVE ASSISTANCE OF COUNSEL: THE PROSPECTIVE PROSECUTION OF CRIMINAL DEFENSE ATTORNEYS FOR "MONEY LAUNDERING"

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I. INTRODUCTION

A. *The Prosecutor's Aim*

The ideal defendant from the prosecutor's perspective might be a silent litigant who blocks all proponents for his or her cause. Short of this ideal, a prosecutor might hope for an opponent who defends him or herself without an attorney's aid, yet is not trained in the attorney's skills. These optimal conditions being absent, the prosecutor might gain considerable advantage by depriving the defendant of the ability to hire a skilled attorney. This would limit the defense to representation by one with a lesser interest in the case, whose fees will be allocated according to the judge's sense of fairness, the resources of the state, the customary court-appointed attorneys' fees in the locale and other relevant factors. The prosecutor's greatest fear in pursuing an alleged criminal may be to encounter a well-prepared and skilled attorney who, assured of the defendant's adequate financial resources, can focus his or her attention on presenting the best possible defense.

This Note focuses on the problems of criminal defense attorneys who must depend on clients to obtain payment. It looks at the controversy surrounding the pretrial impoundment of defendants' property, and the freezing of their assets, making them unable to pay their attorneys. It touches upon the related problem of post-trial forfeitures of attorneys' fees, and the chilling effect that this practice has on obtaining an adequate defense. Its purpose in examining these practices is to predict the courts' future outlook on the latest possibility of prosecutorial incursion into the relationship between criminal defendants and their attorneys: the jailing of criminal defense attorneys for merely *accepting* attorneys' fees.

B. *The Defense Attorney's Dilemma*

Criminal defense attorneys are in a bind. Criminal defense, when undertaken by an attorney privately retained by the defendant, frequently is the province of solo practitioners or law firms of ten or fewer attorneys.[1] A solo or small law practice can be a financially precarious

1. Genego, *Reports from the Field: Prosecutorial Practices Compromising Effective Criminal Defense*, THE CHAMPION, May 1986, at 7 [hereinafter Genego Survey].

In 1985, William J. Genego, Professor of Law at the University of Southern California, conducted a survey of members of the National Association of Criminal Defense Lawyers (NACDL), which claims to be the "single largest membership organization of criminal defense lawyers in the United States." *Id.* at 8 n.5. Surveys were sent to all members of the NACDL; 42% were completed and returned, representing 1648 of the 3950 members of NACDL at that time. *Id.* at 8. Of this group, 32% were solo practitioners, 42% were members of firms with two to five attorneys, and 9% belonged to firms with six to ten attorneys. *Id.* at 10. Eighty-three percent of criminal defense attorneys belonged to firms with ten or fewer attorneys, or were solo practitioners.

operation, existing as it must without the organizational backing and loss-sharing ability of a large law firm.[2] Non-pecuniary rewards must often suffice for the small-scale practitioner.[3] Nevertheless, the average income of a criminal defense attorney compares favorably with that of other attorneys,[4] and the high earners receive the equivalent of the income earned by partners in major law firms.[5]

The Federal Government, by its actions in recent years, has indi-

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2. For an anecdotal description of life as a solo practitioner, see Ravdin, *Carrying the Load on My Own*, LEGAL TIMES, March 2, 1987, at 9.

> Solo and small firm practitioners can't obtain the economies of scale the large firms can. This has forced me to be resourceful and to look constantly for ways to manage my practice more efficiently.
>
> I have to be careful about purchasing books. One of my rules is never to buy any treatise that is more than two volumes. I often have daydreams about having the reporters . . . in my office so that I wouldn't have to use the library for basic legal research.

Id.

3. *See, e.g.*, Ravdin, *supra* note 2. "I've never regretted my decision to go out on my own. It's still a great adventure. I'll probably never get rich, but I'll have a great time. And if I'm lucky, I'll get at least one really good laugh every day." *Id.; see also* Genego Survey, *supra* note 1, which reported that 13% of the respondents earn between $1000 and $30,000 per year. *Id.* at 12.

4. *Compare* Genego Survey, *supra* note 1 *with* Altman & Weil, *Associates' Earnings Increase Six Percent; Partners' Three Percent*, 27 LAW OFF. ECON. & MGMT. 375, 376 (1986-87). Genego's figures show the following: In 1985, 13% of criminal defense attorneys who are members of NACDL earned from $1000 to $30,000 per year; 41% earned $31,000 to $75,000; 18% earned $76,000 to $100,000; 21% earned from $101,000 to $200,000; and 7% earned $201,000 or above. Genego Survey, *supra* note 1, at 12. By assuming that every person in the lowest-paid group earned $20,000; that every person in the next group earned $53,000; that everyone in the next group earned $88,000; in the next group $150,000; and in the highest-compensated group, $300,000, one can average the incomes to arrive at a mean criminal defense attorney income of $91,575. The Altman & Weil study declared that the average income of associates and partners in law firms for 1985 was almost $90,000. Altman & Weil, *supra*, at 376. Given the large margin of error that necessarily accompanies such surveys (most especially the Genego survey, which depended upon voluntary responses from a group not predetermined to be representative, and which was further interpreted using my own analytical methods), the two figures are not meaningfully distinguishable.

5. *See, e.g., 1987 Billing Survey*, NAT'L L.J., Nov. 23, 1987, at S-1. The survey showed that Barry Slotnick, defender of reputed Mafia leader John Gotti and subway gunman Bernhard Goetz, charges $350 per hour. *Id.* at S-15. This was equivalent to the amount billed by David Boies of Cravath, Swaine & Moore, who represented Texaco in the appeal of its litigation against Pennzoil, *id.* at S-14, and was $65 more than the hourly fee of Elliot L. Richardson of Milbank, Tweed, Hadley & McCloy, a former Cabinet member during the Nixon Administration. *Id.* at S-15. Consider also that 7% of the respondents in the Genego Survey, *supra* note 1, earned $201,000 or more; the profits per partner of the twenty largest firms in Washington, D.C., range from $200,000 to $690,000, with median profits residing at approximately $260,000. Abramson, *Survey of Revenues and Profits*, LEGAL TIMES, Sept. 28, 1987, at 7. The top earners of the criminal defense field, therefore, are paid about the same as partners in major law firms.

cated its suspicion that wealthy criminal defense attorneys derive their income from tainted funds.[6] Prosecutors reason that funds obtained by defendants as a result of alleged criminal activity are deemed by statute as belonging to the Government from the moment that the crime was committed.[7] Therefore, an attorney who has obtained funds that the Government believes have been criminally derived may be required to relinquish those funds to the Federal Government,[8] whose claim to the money subordinates that of the attorney.[9]

A person commits a crime under federal statute by simply *knowingly accepting* property from a payor who acquired it through criminal activity.[10] The Justice Department will, under this statute (referred

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6. In the Genego Survey, *supra* note 1, 67% of the respondents reported that they had been subjected to governmental practices tending to interfere with the attorney-client relationship. *Id.* at 11. Those practices were: (1) subpoenas to appear before a grand jury to produce testimony or documents related to fee and/or billing records on representation of a client; (2) summonses from the Internal Revenue Service concerned with legal practice; (3) government secrecy concerning the cooperation of a co-defendant of attorney's client in a multi-defendant trial; (4) challenges to the legitimacy of money received, or attempts to prevent a defendant from using assets to pay an attorney fee; or (5) motions to disqualify the attorney from representing a client. *Id.* These practices are shown to have occurred increasingly frequently after 1983, *id.*, and to occur proportionately more commonly to those who earn higher incomes than to those who earn lower incomes. For example, out of those who received a grand jury subpoena, 3% were low earners, 12% were in the next earning group, 23% in the next, 29% in the next, and 37% were in the top-earning ($200,000 plus) category. *Id.* at 15.

7. *See* 18 U.S.C. § 1963(c) (Supp. IV 1986); 21 U.S.C. § 853(c) (Supp. IV 1986).

8. *See* 18 U.S.C. § 1963(e) (Supp. IV 1986); 21 U.S.C. § 853(g) (Supp. IV 1986).

9. *See* 18 U.S.C. § 1963(c) (Supp. IV 1986); 21 U.S.C. § 853(c) (Supp. IV 1986).

10. 18 U.S.C. § 1957 (Supp. IV 1986). The substantive parts of the statute read:

> (a) Whoever, in any of the circumstances set forth in subsection (d), knowingly engages or attempts to engage in a monetary transaction in criminally derived property that is of a value greater than $10,000 and is derived from specified unlawful activity, shall be punished as provided in subsection (b).
>
> (b)(1) Except as provided in paragraph (2), the punishment for an offense under this section is a fine under title 18, United States Code, or imprisonment for not more than ten years or both.
>
> (2) The court may impose an alternate fine to that imposable under paragraph (1) of not more than twice the amount of the criminally derived property involved in the transaction.
>
> (c) In a prosecution for an offense under this section, the Government is not required to prove the defendant knew that the offense from which the criminally derived property was derived was specified unlawful activity.
>
> (d) The circumstances referred to in subsection (a) are —
>
> (1) that the offense under this section takes place in the United States or in the special maritime and territorial jurisdiction of the United States; or
>
> (2) that the offense under this section takes place outside the United States and such special jurisdiction, but the defendant is a United States person . . . .
>
> . . . .
>
> (f) As used in this section —

to herein as the "Criminally Derived Property Statute"), prosecute attorneys who knowingly accept criminally derived funds as fees from criminal defendants.[11] The attorney's bind is thus obvious: His or her occupation as a criminal defense attorney could lead him or her to becoming a criminal in the eyes of the Government.

The availability of large fees has made the practice of criminal law more lucrative;[12] however, the Government often accuses criminal defense attorneys of being funded by the fruits of their clients' crimes.[13] The Government has decided not to allow certain accused criminals to pay lawyers with suspect funds.[14] Lawyers who cannot obtain funds from their clients must settle for lesser amounts available under the Criminal Justice Act.[15] Their practices, however, might not be support-

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(1) the term "monetary transaction" means deposit, withdrawal, transfer or exchange, in or affecting interstate or foreign commerce, of funds or a monetary instrument . . . ;

(2) the term "criminally derived property" means any property constituting or derived from, proceeds obtained from a criminal offense; and

(3) the term "specified unlawful activity" has the meaning given that term in section 1956 of this title.

See *infra* note 47 for definition of "specified unlawful activity" referred to in 18 U.S.C. § 1957(a) & (f)(3). The Money Laundering Prosecution Improvements Act of 1988, Pub. L. No. 100-690, §§ 6181-87, 102 Stat. 4181 (a component of the Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181), amended section (f)(1) of 18 U.S.C. § 1957 so as to clarify Congress's intent that the statute not be used to infringe defendants' sixth amendment rights. The statute now reads: "(1) the term 'monetary transaction' means deposit, withdrawal, transfer, or exchange, in or affecting interstate or foreign commerce, of funds or a monetary instrument . . . but such term *does not include any transaction necessary to preserve a person's right to representation as guaranteed by the sixth amendment to the Constitution.*" Pub. L. No. 100-690, § 6182, 102 Stat. 4181 (emphasis added).

11. U.S. Dep't of Justice, Prosecutive Policy for Violations of the Money Laundering Control Act—18 U.S.C. § 1957 (Aug. 3, 1987) (draft guidelines prepared by the U.S. Attorneys' Manual Staff of the Executive Office for the U.S. Attorneys under the direction of William F. Weld, Ass't Att'y General, Crim. Div.) [hereinafter 1987 Draft Guidelines]. The 1987 Draft Guidelines have been superseded by a 1988 edition which contains greater safeguards against infringement of defendants' sixth amendment rights to counsel. U.S. Dep't of Justice, Prosecutive Policy for Violations of the Money Laundering Control Act—18 U.S.C. § 1957 (May 12, 1988) (draft guidelines prepared by the U.S. Attorneys' Manual Staff of the Executive Office for U.S. Attorneys under the Direction of John C. Keeney, Acting Ass't Att'y General, Crim. Div.) [hereinafter 1988 Draft Guidelines]. The Draft Guidelines, when finalized, will be incorporated into the United States Attorney's Manual, described *infra* note 66.

12. *See* summary of earnings in Genego Survey, *supra* note 1.

13. *See, e.g.*, cases cited *infra* note 156.

14. *See infra* cases discussed in text accompanying notes 128-255.

15. 18 U.S.C. § 3006A (Supp. IV 1986). The Criminal Justice Act sets a rate of not more than $60 per hour for representation of an indigent defendant in court, and $40 per hour for time reasonably expended out of court on behalf of the defendant. *Id.* at § 3006A(d)(1). No more than $3500 compensation may be paid for any one attorney for defense of a single case involving one or more felonies in a federal district court, with an

able with the small amounts available under that Act.[16] The actions of the Government may have the effect, say defense advocates,[17] of making lawyers less available, and perhaps unavailable, to criminal defendants.[18]

Defense advocates believe that the application of the Criminally Derived Property Statute to attorneys will violate defendants' sixth amendment rights by depriving them of their right to effective assistance of counsel.[19] According to these lawyers, the statute will make attorneys less available to defendants because the attorneys will be afraid that they themselves will be deemed criminals.[20] Further, the

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additional $2500 allowed for an appeal and another $750 for each post-trial motion. *Id.* at § 3006A(d)(2). The maximum amounts may be waived in complex litigation. *Id.* at § 3006A(d)(3).

16. Compare the rates detailed *supra* in note 15 with the average hourly rates for all attorneys announced in the Altman & Weil study, *supra* note 4, at 377. Attorneys who graduated from law school in 1984 were able to bill at between $60 and $75 per hour in 1985. Partners admitted in 1976 billed at $90 to $126 per hour. Experienced lawyers are able to charge more. The average billing rates for lawyers with two to three years experience ranged from $91 per hour in California (the nation's highest) to $72 per hour in the West Central and Southern regions. *Id.*

17. The terms "defense advocates" and "criminal defense advocates" are used herein to refer to the body of opinion represented predominantly by the National Association of Criminal Defense Lawyers. See description of NACDL, *supra* note 1. The NACDL publishes *The Champion*, a monthly publication that details the concerns of defense lawyers. The NACDL also acted as amicus curiae on behalf of the defendants in United States v. Harvey, 814 F.2d 905 (4th Cir. 1987), *rev'd sub nom.* In re Forfeiture Hearing as to Caplin & Drysdale, Chartered, 837 F.2d 637 (4th Cir. 1988), *aff'd sub nom.* Caplin & Drysdale, Chartered v. United States, 109 S. Ct. 2646 (1989), discussed *infra* at text accompanying notes 128-99, 211-55.

18. *See* Genego Survey, *supra* note 1:

> [A] substantial number of attorneys . . . reported that they had made changes in their practice of criminal defense as a result of the prosecution's increased use of the practices identified by the survey . . . . Fourteen percent of the attorneys stated that they had decided not to take a case based on a concern that the case might result in an investigation that would affect their legal practice or that the government might attempt to forfeit their fee.

Id. at 13.

19. *See, e.g.*, Franklin, *Fee Tale: Money Laundering Guidelines Worry the Defense Bar*, N.Y.L.J., May 14, 1987, at 5, col. 2; Zeese & Zwerling, *Lawyer Money Laundering in Light of the Fee Forfeiture Experience*, 1 DRUG L. REP. 313, 314 (May-June 1987) ("[t]he threat of having to stand before a judge accused of money laundering will strike even greater fear in the hearts of criminal defense lawyers than having their fees seized."); J. VILLA, BANKING CRIMES—FRAUD, MONEY LAUNDERING, AND EMBEZZLEMENT § 8.10[2] (1987) [hereinafter J. VILLA] ("[t]he potential for interference with . . . the accused's sixth amendment right to counsel is great . . . .").

20. Miami defense attorney Albert Krieger has stated that he was forced to turn down a major drug case because knowledge that he gained about his client—learned through representing other clients—led him to fear prosecution under the new law. Franklin, *supra* note 19, at 5. Consider also that the incidents reported by Genego, *supra* note 6, have had the effect of chasing some defense attorneys out of criminal law, *id.* at

statute will make clients more susceptible to unfavorable plea bargains negotiated by attorneys who, in return for the prosecutor not indicting them, will settle for less favorable terms than their clients might otherwise attain.[21]

The Anti-Drug Abuse Act of 1988 added a provision recognizing the possible infringement of sixth amendment rights posed by such an interpretation of the statute.[22] Defense advocates have responded favorably.[23] Nevertheless, this provision is not as explicit as the language initially proposed when the Criminally Derived Property Statute was first considered.[24] The Justice Department has recognized the possible effect of the statute upon obtaining effective assistance of counsel,[25] but nevertheless, has set forth draft guidelines under which it intends to prosecute attorneys for accepting criminally derived legal fees.[26] Criminal defense advocates believe that this possibility of prosecution under the statute will severely compromise the effectiveness of defense attorneys.[27]

C. *Purpose of this Note*

This Note examines 18 U.S.C. § 1957, which may have made the receipt by attorneys of criminally derived fees a criminal offense.[28] It

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13-14; the effect is likely to be greater if criminal prosecutions may be brought simply for accepting a fee.

21. This possibility may be the outcome of a situation described in DePetris & Bachrach, *New Money Laundering Act—Assault on Right to Counsel*, N.Y.L.J., June 25, 1987, at 1, col. 4: "[An] attorney . . . may fear that a vigorous defense at trial might draw a zealous prosecutor's attention to the attorney or might lead to evidence that the attorney's fee was derived from the proceeds of criminal activity." *Id.* at 4, col. 3. The fear may lead to an easier plea bargain before the attorney is faced with defending the client at trial.

22. For the text of the amended statute, see *supra* note 10.

23. *See, e.g.*, Zeese, *The Ominous Omnibus Drug Bill of 1988*, 2 DRUG. L. REP. 65, 68 (1988) ("[t]his [provision] should help to greatly reduce the fear of prosecution under the money laundering statutes for criminal defense attorneys"); Smith, *Legislative and Legal Developments* (Federal), CRIMINAL JUSTICE, Winter 1989, at 2 ("[i]t offers some protection to attorneys representing clients in criminal matters.").

24. For the text of the proposed language, see *infra* note 56.

25. 1987 and 1988 Draft Guidelines, *supra* note 11, at 9-105.400. The Guidelines have not been amended following passage of the 1988 Money Laundering Prosecutions Improvements Act. *See supra* note 10. However, since the amendment to section (f)(1) of the Act merely points out the sixth amendment concerns of the drafters, and the Guidelines acknowledge the sixth amendment concerns of defense attorneys, the Justice Department is likely to find no need to amend its Guidelines beyond the changes included in the 1988 version. *See infra* text accompanying notes 56-119.

26. 1987 & 1988 Draft Guidelines, *supra* note 11, at 9-105.100-.500.

27. *E.g.*, DePetris & Bachrach, *supra* note 21, at 4, col. 2.

28. *See infra* notes 36-65 and accompanying text. As of March 1988, no attorney had been prosecuted under the statute, and the final guidelines had not been promulgated by

then outlines the Justice Department's Draft Guidelines which interpret the statute.[29] It discusses the scope of the sixth amendment in light of related cases challenging attorney fee forfeiture under the racketeering[30] and continuing criminal enterprise[31] statutes on sixth amendment grounds.[32] It concludes with the recommendation that some portions of the Justice Department's Draft Guidelines be made statutory, and that others be modified.[33] Overall, this Note supports the Justice Department's view that, in light of court cases interpreting the scope of sixth amendment protection, that amendment is not transgressed by its interpretation of the scope of the statute. However, the Note also warns of possible dangers resulting from enforcement of the statute against attorneys,[34] and foretells a scenario in which courts may be forced to recognize per se sixth amendment violations engendered by the Criminally Derived Property Statute.[35]

II. THE STATUTE

Section 1957 of title 18, entitled "Engaging in monetary transactions in property derived from unlawful activity,"[36] was passed as part of the Money Laundering Control Act of 1986,[37] which was a component of the Anti-Drug Abuse Act of 1986.[38] It was amended by the Money Laundering Prosecution Improvements Act of 1988,[39] which in

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the Justice Department. No case had yet been reported interpreting the statute.

29. *See infra* notes 66-119 and accompanying text.

30. 18 U.S.C. §§ 1961-1968 (1982 & Supp. IV 1986) (commonly called RICO (Racketeer Influenced and Corrupt Organizations Act)). For a discussion of RICO and the Continuing Criminal Enterprise (CCE) statute, see *infra* note 31.

31. 21 U.S.C. §§ 848-857 (1982 & Supp. IV 1986) (commonly called CCE). RICO and CCE were the preferred weapons used by prosecutors during the 1980s to attack major criminal operations. The cases brought under these statutes produce the lengthiest trials and the most complex litigation in all of criminal law. As one commentator has observed:

> "[T]he exigencies of RICO cases" . . . include the vast resources required to defend RICO charges relative to "the resources or expertise of the average federal public defender's office," the significant resources the government devotes to RICO prosecutions, the complexity of the issues in RICO cases, and the length of time a RICO investigation may consume.

Brickey, *Forfeiture of Attorneys' Fees: The Impact of RICO and CCE Forfeitures on the Right to Counsel*, 72 VA. L. REV. 493, 520 (1986) (quoting United States v. Rogers, 602 F. Supp. 1332, 1349 (D. Colo. 1985)) (footnotes omitted).

32. *See infra* notes 120-255 and accompanying text.

33. *See infra* notes 291-95 and accompanying text.

34. *See infra* notes 256-90 and accompanying text.

35. *Id.*

36. *See supra* note 10 for the text of 18 U.S.C. § 1957 (Supp. IV 1986).

37. Pub. L. No. 99-570, § 1351, 100 Stat. 3207, 3207-18 (1986) (codified as amended at 18 U.S.C. §§ 1956-1957 (Supp. IV 1986)).

38. Pub. L. No. 99-570, 100 Stat. 3207 (1986).

39. Pub. L. No. 100-690, §§ 6181-6187, 102 Stat. 4345 (1988).

turn was a component of the Anti-Drug Abuse Act of 1988.[40] The Money Laundering Control Act added two sections to title 18: sections 1956 and 1957. Despite the title of the Act, section 1957 does not involve money laundering.[41]

Section 1957 criminalizes "knowingly engag[ing]" in a monetary transaction involving more than $10,000 worth of property derived from criminal activity.[42] The statute describes "monetary transaction" as: "the deposit, withdrawal, transfer, or exchange, in or affecting interstate or foreign commerce, of funds or a monetary instrument . . . by, through, or to a financial institution . . . ."[43] Clearly this includes most banking transactions.[44] Thus, by accepting $10,000 from a client for his or her representation (or from a customer for any other sort of transaction), and placing it in the bank, an attorney would likely be deemed engaging in a monetary transaction.

The statute defines "criminally derived property" as "any property constituting, or derived from, proceeds obtained from a criminal offense."[45] The offense must be in the category of "specified unlawful activity,"[46] which covers a wide range of criminal activities.[47] Further, a

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40. Pub. L. No. 100-690, 102 Stat. 4181 (1988).

41. Money laundering is defined in section 1956 as "conduct[ing] . . . a financial transaction" with knowledge "that the property involved . . . represents the proceeds of some form of unlawful activity" and "knowing that the transaction is designed in whole or in part (i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity; or (ii) to avoid a transaction reporting requirement under State or Federal law . . . ." 18 U.S.C. § 1956 (Supp. IV 1986). Concealment is a key element. A true money laundering scheme might transform the proceeds of an illicit drug sale into ownership of a legitimate business. Earnings which could not be reported as drug profits may be reported as, for example, earnings in the restaurant business. The drug dealer who successfully conceals his proceeds in this way could profit from the earnings of the business and later profit from selling the business.

42. 18 U.S.C. § 1957(a) (Supp. IV 1986). The word "engage" is undefined within the statute. Its ordinary meaning is "to employ or involve one's self; to take part in; to embark on . . . . It imports more than a single act or transaction or an occasional participation." BLACK'S LAW DICTIONARY 622 (rev. 4th ed. 1968) (citation omitted).

43. 18 U.S.C. § 1957(f)(1) (Supp. IV 1986); *see supra* note 10.

44. *See* J. VILLA, *supra* note 19, § 8.08[3][b]. The transaction may be performed either by a customer of the financial institution, or by the financial institution itself. *Id.*

45. 18 U.S.C. § 1957(f)(2) (Supp. IV 1986).

46. 18 U.S.C. § 1957(a) & (f)(3) (Supp. IV 1986).

47. Section 1957(f)(3) refers to section 1956 for the meaning of "specified unlawful activities." Section 1956 lists those activities as:

> (A) any act or activity constituting an offense listed in [18 U.S.C. § 1961(1)] except an act which is indictable under the Currency and Foreign Transactions Reporting Act;
>
> (B) with respect to a financial transaction occurring in whole or in part in the United States, an offense against a foreign nation involving the manufacture, importation, sale, or distribution of a controlled substance (as such

person must have "knowingly" engaged or attempted to engage in a monetary transaction to be convicted of a crime under this statute.[48] Willful blindness will satisfy the requirement of actual knowledge.[49] The knowledge requirement of the statute is ambiguous as to whether a person (a) must know that the transaction involved criminally derived property and that the property has a value greater than $10,000; or (b) need only know that the transaction involved criminally derived property, irrespective of value.[50] Likewise, the statute does not instruct whether payment worth less than $10,000 when accepted, but worth more than $10,000 when the monetary transaction occurs, transgresses the law.[51]

In summation, six (and possibly seven) requirements must be met for prosecution under the statute: (1) engaging or attempting to en-

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term is defined for the purposes of the Controlled Substances Act);

(C) any act or acts constituting a continuing criminal enterprise as that term is defined in section 408 of the Controlled Substances Act (21 U.S.C. § 848); or

(D) an offense under section 152 (relating to concealment of assets; false oaths and claims; bribery), section 215 (relating to commissions or gifts for procuring loans), any of sections 500 through 503 (relating to certain counterfeiting offenses), section 511 (relating to securities of States and private entities), section 543 (relating to smuggling goods into the United States), section 641 (relating to public money, property, or records), section 656 (relating to theft, embezzlement, or misapplication by bank officer or employee), section 666 (relating to theft or bribery concerning programs receiving Federal funds), section 793, 794, or 798 (relating to espionage), section 875 (relating to interstate communications), section 1201 (relating to kidnapping), section 1203 (relating to hostage taking), section 1344 (relating to bank fraud), or section 2113 or 2114 (relating to bank and postal robbery and theft) of this title, section 38 of the Arms Export Control Act (22 U.S.C. § 2278), section 2 (relating to criminal penalties) of the Export Administration Act of 1979 (50 U.S.C. App. § 2401), section 203 (relating to criminal sanctions) of the International Emergency Economic Powers Act (50 U.S.C. § 1702), or section 3 (relating to criminal violations) of the Trading with the Enemy Act (50 U.S.C. App. § 3).

18 U.S.C. § 1956(c)(7) (Supp. IV 1986).

48. 18 U.S.C. § 1957(a) (Supp. IV 1986).

49. SENATE COMM. ON THE JUDICIARY, REPORT ON THE MONEY LAUNDERING CRIMES ACT OF 1986, S. REP. No. 433, 99th Cong., 2d Sess. 10 (1986); 1987 & 1988 Draft Guidelines, *supra* note 11, § 9-105.200 (citing United States v. Jewell, 532 F.2d 697 (9th Cir.) (en banc), *cert. denied*, 426 U.S. 951 (1976)); J. VILLA, *supra* note 19, §§ 8.08[3][d], 8.03[1][a] (citing 1 E. DEVITT & C. BLACKMAR, FEDERAL JURY PRACTICE & INSTRUCTIONS § 14.09 (3d ed. 1977)). *But see infra* text accompanying notes 75-76 for Justice Department policy regarding willful blindness.

50. J. VILLA, *supra* note 19, § 8.08[3][d].

51. *Id.*; *see infra* text accompanying notes 79-80 for the Justice Department's determination that the time to determine criminal knowledge is the time of the monetary transaction, not the time of acceptance of the property. For definition of "monetary transaction," see *supra* text accompanying note 43.

gage; (2) in a monetary transaction; (3) in criminally derived property; (4) knowing that the property is criminally derived; (5) the value of the property exceeds $10,000; and (6) the property must be derived from specified unlawful activity.[52] A possible seventh element is knowledge that the property has a value greater than $10,000.[53] These are the major provisions of the statute; their applicability to the attorney-client relationship, and their possible interference with that relationship, are discussed below.[54]

Criminal defense advocates believe that acceptance of fees from criminal defendants is threatened by application of this statute to criminal defense attorneys.[55] Drafters of the 1986 Acts explicitly omitted attorneys from coverage of the bill as reported by the House Judiciary Committee.[56] The bill that was eventually passed by Congress,[57] however, deleted the exception contained in the earlier House version. Two members of the House of Representatives explained that the pro-

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52. J. VILLA, *supra* note 19, § 8.08[3][d].

53. *See supra* text accompanying note 50.

54. *See infra* notes 256-90 and accompanying text.

55. *See supra* notes 21 and 27 and accompanying text.

56. H.R. REP. No. 855, 99th Cong., 2d Sess., pt. 1 (1986). The Bill, as originally recommended by the Committee on the Judiciary of the House of Representatives, provided:

> Whoever, in any of the circumstances set forth in subsection (d), knowingly engaged or attempts to engage in a financial transaction in criminally derived property that is derived from a designated offense shall be punished as provided in subsection (b). This paragraph does not apply to financial transactions involving the bona fide fees an attorney accepts for representing a client in a criminal investigation or any proceeding arising therefrom.

Id. at 1 (proposing, in H.R. 5217, 99th Cong., 2d Sess., § 2 (1986), the addition of § 1956(a)(1) to title 18 of the U.S. Code; § 1956 was later renumbered § 1957). The Judiciary Committee explained:

> The Subcommittee [on Crime] was aware of a potential impact upon the exercise of the sixth amendment right to the effective assistance of counsel in the event of application of this offense to bona fide fees received by attorneys. An attorney . . . must inquire into many aspects of a client's personal lives [sic] and financial circumstances and thus may learn that part of the fee with which the attorney has been paid was derived from a designated offense. The Subcommittee was very concerned that, in the absence of this provision, the potential for such discovery might have had the effect of inhibiting the attorney's complete investigation of the client's case (to avoid learning any information which could have triggered this offense) and would thus have interfered with the client's sixth amendment right to effective assistance of counsel.

H.R. REP. No. 855, 99th Cong., 2d Sess., pt. 1, at 14 (1986).

The House of Representatives passed a version of the 1988 Money Laundering Prosecution Improvements Act, Pub. L. No. 100-690, §§ 6181-87, 102 Stat. 4354 (1988), which contained the above provision. That provision was modified in conference to the present version of 18 U.S.C. § 1957(f)(1); *see supra* note 10 and *infra* text accompanying note 62.

57. Pub. L. No. 99-570, § 1351, 100 Stat. 3207, 3207-3218 (1986) (codified as amended at 18 U.S.C. §§ 1956-1957 (Supp. IV 1986)).

vision exempting attorneys was "omitted because of an agreement that it is unnecessary because the offense could not be applied" against attorneys accepting bona fide fees.[58] However, the fears of criminal defense advocates were aroused by the clearly stated intent of the Justice Department to prosecute attorneys under section 1957.[59] In fact, the Justice Department urged Congress, during its debates on the bill that created section 1957, not to include the provision exempting attorneys from the law's coverage.[60] The Justice Department's intent is "to prosecute [attorneys] who are knowingly receiving proceeds of illegal activity, just like any other person receiving stolen property . . . ."[61]

The 1988 Money Laundering Prosecution Improvements Act[62] addressed attorneys' concerns by adding the intent of Congress to section (f)(1) of the statute. The new provision assures attorneys that Congress has no intent to advocate transgressions of the sixth amendment. The statute explains: "[T]he term 'monetary transaction' means deposit, withdrawal, transfer or exchange, in or affecting interstate or foreign commerce, of funds or a monetary instrument, . . . but such term does not include any transaction necessary to preserve a person's right to representation as guaranteed by the sixth amendment to the

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58. 132 CONG. REC. E3822 (daily ed. Nov. 6, 1986) (statement of Rep. Bill McCollum). Representative McCollum went on to say:

> [S]uch an application would be an unwarranted application of this offense . . . .
>
> I think that last night most of us working on this issue recognized that the risk that the Department of Justice would prosecute an attorney in this circumstance was really so very remote that a special statutory exception was really not necessary . . . .
>
> We did not omit this provision because we do not have any doubts about the wisdom of the policy it was intended to carry out. There was concern about the narrowness of the exception which the provision created.

Id. The Congressman then discussed the possibility of other exceptions that might be desirable, such as the acceptance by a doctor of money for an emergency operation. The Representative feared that, if an explicit exception is placed within the statute, other exceptions, which should be inferred on public policy grounds, might be interpreted by courts as impermissible extensions of the law. *Id.* The courts may conclude, implied the Representative, that all intended exemptions were included in the Bill.

The Congressman also expressed fears about "racial or ethnic bigotry based upon invalid stereotyping lead[ing] to a situation in which vital services are not provided to certain members of the community." *Id.* This fear refers to a perceived tendency for the public to identify members of certain nationalities or races as more likely to be criminal than others. "A call for an ambulance should be answered without the dispatcher wondering whether the ambulance company can be charged with unlawful monetary transactions because of who the patient might be." *Id. See also* comments made by Rep. William E. Hughes, *id.* at E3827-28 (daily ed. Nov. 6, 1986).

59. 1987 and 1988 Draft Guidelines, *supra* note 11.

60. Franklin, *supra* note 19, at 5.

61. *Id.*

62. Pub. L. No. 100-690, §§ 6181-6187, 102 Stat. 4345 (1988).

Constitution."[63]

This statement, while it appeases some criminal defense practitioners,[64] hardly alters the meaning of the statute. By specifically invoking the sixth amendment, it sets a limit to the scope of the statute scarcely different from the interpretation that a conscientious court might have drawn. However, it may prove helpful, in any future prosecutions of attorneys under the statute, to point out that Congress specifically raised the specter of attorney prosecution under the statute, and implicitly counseled heightened scrutiny whenever such a prosecution is brought.[65]

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63. *Id.* (amending 18 U.S.C. § 1957(f)(1) (Supp. IV 1986)).

64. *See* Zeese, *supra* note 24; Smith, *supra* note 23.

65. Senator Kennedy, in remarks added to the Congressional Record of Nov. 10, 1988, expounded on the meaning of the language in the statute:

> [T]he term "right to representation as guaranteed by the sixth amendment to the constitution," as used in the substitute provision, includes the fundamental right to counsel of choice, as recognized by the Supreme Court in Powell v. Alabama, 287 U.S. 45, 53 (1932), and further developed on frequent occasions by the Federal Courts of Appeals and the Supreme Court itself.
>
> . . . .
>
> Although weakening the ability of an accused to defend himself at trial is an advantage for the Government, it is not a legitimate Government interest which can be used to justify invasion of a constitutional right. United States v. Monsanto, 852 F.2d 1400, 1403 (2d Cir. 1988) (en banc) (per curiam) (opinion of Winter, Meskill and Newman) [*see infra* notes 200-07 and accompanying text]. [T]o the extent that the Government has an interest in preventing criminals from using ill-gotten gains to hire attorneys, that interest is not sufficient to outweigh a constitutional right, particularly since the invasion of the right would occur before the client is proven to be a criminal or his property to be ill-gotten.
>
> . . . [A] transaction is "necessary" to protect the sixth amendment rights, within the terms of the amendment, when it involves a bona fide fee paid in good faith for legitimate legal representation by counsel of choice.

134 CONG. REC. S17360, 100th Cong., 2d Sess. (daily ed. Nov. 10, 1988).

Senator Kennedy concluded by stating that the interpretation of bona fide fees propounded by the Justice Department in its 1987 Draft Guidelines is the interpretation intended by Congress. *Id.* For a discussion of the 1987 Draft Guidelines, see *infra* notes 66-119 and accompanying text. *See also* the section-by-section analysis of the Senate Bill: "The exemption, however, applies only to fees that are 'necessary to preserve a person's right to representation as guaranteed by the sixth amendment to the Constitution.' Fees not necessary to accomplish this purpose are not exempted." 134 CONG. REC. S17363 (daily ed. Nov. 10, 1988).

Congressional hesitancy about including broader protection for attorneys, as contained in the House Bill as reported by the Judiciary Committee in 1986 and passed by the House of Representatives in 1988, *see supra* note 56, was expressed by Senator Dole, the Republican Minority Leader, on the floor of the Senate:

> I know there is a sixth amendment . . . but it is going to be hard to explain to some why we take care of lawyers, that we have a forfeiture or whatever [sic]. They will be paid even though the money comes from drug trafficking.
>
> We do not exempt anybody else but attorneys are exempt and as my friend from New Hampshire [Senator Rudman] pointed out, it has been that way for-

III. THE DRAFT GUIDELINES

On August 3, 1987, the United States Department of Justice issued Draft Guidelines entitled "Prosecutive Policy for Violations of the Money Laundering Control Act—18 U.S.C. Section 1957."[66] The Justice Department issued a revised version of the Guidelines on May 12, 1988.[67] These publications (referred to herein as the "1987 Draft Guidelines" and the "1988 Draft Guidelines"), outline the policy that the Justice Department proposes to follow in enforcing the Money Laundering Control Act against attorneys who accept criminally derived legal fees.

When these Draft Guidelines take their final form, they will provide guidance for prosecutors in the Justice Department. They will not, however, "create [legal] rights or effect limitations upon the power of the Government."[68] This caveat is important in that, although the Guidelines urge restraint in the usage of the Act by prosecutors, the boundaries announced by the Guidelines as restraints on the action of prosecutors may be exceeded if the need arises, without creating grounds on which attorney/defendants may protest. The final guidelines will, presumably, account for changes in the statute effected by the 1988 Money Laundering Prosecution Improvements Act.[69] Since

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ever. He indicated to me that bank robbers do not get their money from the savings and loan when they pay their lawyers. It is money they robbed from the bank.

134 CONG. REC. S17303 (daily ed. Oct. 21, 1988).

66. *See supra* note 11. These Draft Guidelines are addressed to "Holders of United States' Attorneys' Manual Title 9." The United States' Attorneys' Manual [hereinafter USAM] is a repository of all materials and general policies and procedures relevant to the work of the U.S. Attorneys' Offices. "[It] provides only internal Department of Justice guidance [and] does not . . . create any rights . . . enforceable at law by any party in any matter civil or criminal. Nor are any limitations . . . placed on otherwise lawful litigative prerogatives of the Department of Justice." USAM § 1-1.100, *reprinted in* 2 THE DEPARTMENT OF JUSTICE MANUAL § 1-1.100 (P-H 1987).

The Prentice-Hall rendition of the USAM, entitled THE DEPARTMENT OF JUSTICE MANUAL (P-H 1987 & Supp. 1988) [hereinafter DOJM], is available to practitioners. This 12-volume compendium, edited by Theodore B. Olson, John A. Mintz, and Daniel E. Mangan, contains not only the complete text of the USAM, but also a selection of "other policies, procedures, and guidelines . . . communicated to Department attorneys in additional manuals, monographs, and printed materials, as well as through directives and orders of the Attorney General." 1 DOJM xxiii (P-H 1987). When the Draft Guidelines are finalized, they will be incorporated into title 9 of the USAM, under section 9-105.000, "Money Laundering." This title appears at 9 DOJM ch. 105 (P-H 1987).

67. *See supra* note 11.

68. Franklin, *supra* note 19, at 5 (quoting Miami defense attorney Albert Krieger, who is a member of the ABA House of Delegates representing the National Association of Criminal Defense Lawyers). Mr. Krieger was paraphrasing USAM § 1-1.100, *reprinted in* 2 DOJM § 1-1.100 (P-H 1987); *see supra* note 66.

69. Pub. L. No. 100-690, §§ 6181-6187, 102 Stat. 4345 (1988).

the 1988 Act does little more than promote cognizance of the sixth amendment,[70] and the right to counsel is already recognized as an area for concern by the 1987 and 1988 Draft Guidelines,[71] it is doubtful whether the 1988 amendments will have any effect on the ultimate Justice Department Guidelines.[72]

The first provision in the 1988 Draft Guidelines, after a statement of the content of the statute,[73] is the requirement that the Assistant Attorney General of the Criminal Division approve any indictment under 18 U.S.C. § 1957 if the potential defendant is an attorney and the criminally derived property is an attorney fee paid for providing representation.[74] This provision is an acknowledgment that this is a sensitive area, which the Justice Department wants to oversee.

The statute proclaims that the Government need not prove that the defendant had actual knowledge that the criminally derived property was linked to specified unlawful activity.[75] The Justice Department's Draft Guidelines therefore state that an attorney only must have known that the property came from some unlawful activity, but not necessarily the specified unlawful activity.[76] The standard used by the Justice Department is the standard set out in *United States v. Jewell*:[77]

> [An attorney] may be proven to have knowledge that property is criminally derived by proof that he/she either (1) knows that the property is criminally derived or (2) is willfully blind to this fact—*i.e.*, he/she has his/her suspicions definitely aroused and refuses to investigate for fear he/she will discover that the property is criminally derived.[78]

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70. *See* text of amended statute, *supra* note 10 and text accompanying note 62. *See also* comments of Senator Kennedy, *supra* note 65.

71. *See* 1987 & 1988 Draft Guidelines, *supra* note 11, § 9-105.400.

72. *See* remarks of Senator Kennedy, *supra* note 65, in which he cites the Justice Department Guidelines for the meaning of the provision added to section 1983(f)(1) by Congress.

73. 1988 Draft Guidelines, *supra* note 11, § 9-105.000.

74. *Id.* § 9-105.100.

75. 18 U.S.C. § 1957(c) (Supp. IV 1986); *see supra* note 10.

76. 1988 Draft Guidelines, *supra* note 11, § 9-105.200, para. 1.

77. 532 F.2d 697 (9th Cir.) (en banc), *cert. denied*, 426 U.S. 951 (1976).

78. 1988 Draft Guidelines, *supra* note 11, § 9-105.200, para. 2 (adopting the holding in *Jewell*, 532 F.2d at 699-704). *But see* text accompanying *infra* notes 86-88 (describing 1988 Draft Guidelines § 9-105.400) for Justice Department's limitation on use of the "willfully blind" standard as applied to attorneys.

The en banc Ninth Circuit in *Jewell* accepted, as a substitute for actual knowledge, a state of mind in which ignorance "was solely and entirely a result of . . . having made a conscious purpose to disregard . . . , with a conscious purpose to avoid learning the truth." 532 F.2d at 700 (quoting district court instructions to the jury). Judge (now Justice) Anthony M. Kennedy wrote a dissenting opinion criticizing the substitution of "de-

The Draft Guidelines state that the relevant time for determining whether the attorney had the requisite knowledge is the time of the monetary transaction.[79] If the attorney does not know of the criminal derivation when he receives the property, but knows of it when he, for example, puts the property in the bank, then he has the requisite knowledge at the relevant time.[80] The 1988 Draft Guidelines added a caveat that did not appear in the 1987 rendition: One factor that the Justice Department will seek to ascertain before attempting to prosecute is the "clarity of the criminality of the underlying transaction."[81] Money derived from conduct not clearly criminal (the Guidelines proffer a tax shelter scheme as an example) is less likely to raise the potential for prosecution than underlying conduct that is clearly criminal (the Guidelines suggest drug dealing). This distinction places an added burden on the defense attorney to evaluate the clarity of criminality as it will appear to the Justice Department—funds may not be accepted from defendants whose acts are "clearly criminal," whereas they may be accepted from those defendants whose criminal acts are not so clear. Without a comprehensive list of clearly criminal acts and acts that are less clear, the defense attorney's evaluation of the distinction could be a crucial one in protecting him or herself from prosecution.

For the Justice Department to initiate an investigation, there must be some evidence that the attorney was informed of the property's source "either by the person who gave it to him/her or by some third party."[82] But "such evidence is not always required."[83] The Draft Guidelines provide a list of other types of behavior which may support a decision to investigate or prosecute.[84]

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liberate ignorance" for "knowledge" when such substitution is not authorized by statute. "[I]gnorance, no matter how unreasonable, cannot provide a basis for criminal liability when the statute requires knowledge." *Id.* at 707 (Kennedy, J., dissenting) (footnote omitted).

79. 1988 Draft Guidelines, *supra* note 11, § 9-105.200, para. 3. The term "monetary transaction" is defined *supra* at text accompanying note 43.

80. 1987 & 1988 Draft Guidelines, *supra* note 11, § 9-105.200, para. 3.

81. 1988 Draft Guidelines, *supra* note 11, § 9-105.200, para. 3.

82. *Id.* para. 4.

83. *Id.*

84. *Id.* The other types of behavior are:

(1) Acceptance of a commission when general industry practice does not provide for commissions.
(2) Acceptance of a commission above market rates.
(3) Use of false names to purchase goods and/or services.
(4) Numerous and unjustified transfers of title to others or sham transfers to title.
(5) Failure to provide accurate identification or use of suspicious identification.
(6) Use of cash in large denominations.
(7) Knowledge that legitimate livelihood of purchaser is insufficient to allow purchaser to afford the goods and/or services to be purchased.

The Draft Guidelines differentiate between ordinary criminally derived property, and criminally derived attorneys' fees.[85] The Justice Department understands that an attorney must investigate the client, and that such investigation will often lead to knowledge of the illicit source of the property,[86] and therefore, the Justice Department will not prosecute attorneys who are merely willfully blind to the source of their clients' funds.[87] One who accepts bona fide attorney fees that are criminally derived must have actual knowledge of their source.[88]

The "actual knowledge" requirement is limited by concerns about attorney-client confidentiality. Such knowledge may not consist solely of "confidential communications made by the client preliminary to and with regard to undertaking representation in the criminal matter[,] or . . . other information obtained . . . in furtherance of the obligation to effectively represent the client."[89] However, if the attorney is carrying out some other matter for the client, such as a commercial transaction unrelated to such representation, the attorney will be held criminally liable for his knowledge of criminal derivation of fees.[90]

The Justice Department defines bona fide fees as those "paid in good faith without fraud or deceit for representation concerning the defendant's personal criminal liability;"[91] but, if a third party pays the defendant's legal fees and that third party is protecting his own legal interests or interests in the "overall criminal venture," the Justice Department does not consider such payments to be bona fide.[92] The Department, however, has assured that a fee payment made by a third party does not, without more, automatically signify that the third party's payment is not bona fide.[93]

The Government expresses concern about, and points its prosecutorial power most directly at, sham transactions that are meant to hide the source of income from governmental investigative agencies.[94] A transaction is a sham when evidence exists of a "scheme or plan" that would conceal, yet preserve, some party's interest in an as-

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(8) Grossly inadequate or grossly inflated purchase/sale price.
(9) Seller's obligation to break or bend company rules to consummate the deal.
(10) Conducting business under odd circumstances, at irregular hours, or in unusual locations by industry standards.

85. *Id.* § 9-105.300.
86. *Id.* § 9-105.400, para. 1.
87. *Id.* § 9-105.420, para. 2.
88. *Id.* §§ 9-105.400, para. 2; .420, para. 2; .430, para. 1.
89. *Id.* § 9-105.400, para. 2.
90. *Id.* para. 4.
91. *Id.* § 9-105.410, para. 1.
92. *Id.* para. 2.
93. *Id.*
94. *Id.* para. 3.

set or his "ability to use it beneficially."[95] The Justice Department suggests that this scheme or plan may be established by proving, for example, that the property's value far exceeded the value of the services rendered to the client, and that the attorney had agreed to transfer the property back to the client (or some other party) sometime after representation had concluded.[96] The Department does not require proof that the attorney was an actual conspirator along with his client or third party payor; he need only have been a participant in the criminal activity giving rise to the property.[97]

The Draft Guidelines direct prosecutors to make certain they have proof beyond a reasonable doubt that the specific property involved in the monetary transaction was criminally derived from "specified unlawful activity,"[98] that the attorney actually knew this to be true,[99] and that this knowledge was derived from information known to the attorney from outside the relationship with the client.[100]

The Draft Guidelines remind prosecutors that the "actual knowledge" standard for prosecuting attorneys[101] (as opposed to the "actual knowledge or willful blindness" standard for prosecuting others)[102] is a matter of policy and not a statutory mandate.[103] Therefore, the Government is not precluded from requesting a "willful blindness" instruction at trial.[104] The Justice Department expects that such an instruction will be submitted only in extraordinary cases.[105]

For the Justice Department to prosecute an attorney, it must possess evidence that the attorney's actual knowledge of the illegal source of the fees came from a source of information other than the three specifically forbidden:

(1) confidential communications made by the client preliminary to and with regard to whether the attorney will undertake the representation;
(2) confidential communications made by the client during the course of representation; and
(3) information obtained by the attorney during the course of

95. *Id.*
96. *Id.*
97. *Id.*
98. "Specified unlawful activity" is defined in 18 U.S.C. § 1956 (Supp. IV 1986); *see supra* note 47.
99. 1988 Draft Guidelines, *supra* note 11, § 9-105.420, para 2. *See also infra* text accompanying notes 75-90.
100. *Id.* § 9-105.430, para. 1.
101. *Id.* §§ 9-105.400, para. 2; .420, para. 2; and .430, para 1.
102. *Id.* § 9-105.200, para. 2.
103. *Id.* § 9-105.420, para. 3.
104. *Id.*
105. *Id.*

> the representation and in furtherance of the obligation to effectively represent the client.[106]

If the Justice Department has evidence of another source of the attorney's knowledge, it may use that evidence to prosecute the attorney.[107] Such evidence may include testimony of a client at trial as to the scope of the attorney's knowledge, so long as that knowledge is not protected by the attorney-client privilege.[108] That knowledge will usually, according to the Guidelines, have existed prior to the attorney's representation of the client.[109] For example, if the attorney regularly represents defendants whose crimes are part of the same enterprise, or if he has in the past represented a co-conspirator of the present client, the information comes from sources outside of the attorney-client privilege, and proof of such actual knowledge may be used to prosecute the attorney.[110]

The 1988 Draft Guidelines added further examples of sources of information that may, or may not, give rise to an investigation of an attorney. If an attorney hears a criminal boasting of his lucrative activities before he consents to represent him, or contemplates representing him, the attorney may be indicted under section 1957.[111] However, if an attorney merely has a long-term attorney-client relationship with a chronic indictee, the attorney cannot be assumed to have actual knowledge of specific criminal activities.[112] Pre-representation publicity surrounding a client will not suffice under the 1988 Draft Guidelines to pass actual knowledge of the criminal source of funds on to the attorney.[113] Nor will the mere fact that a single attorney represents more than one member of a reputed criminal enterprise.[114]

One last note by the Justice Department states that an attorney for the Department may not inform a criminal defense attorney that his fees are criminally derived if the purpose of providing that information is to prove that the attorney knew, from an outside source, the derivation of his fees.[115] A Justice Department official, in other words, may not be the "outside source" that provides the inculpating information, with the aim of providing a basis on which to prosecute the attorney.[116]

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106. *Id.* § 9-105.430, para. 1.
107. *Id.* para. 2.
108. *Id.*
109. *Id.* para. 3.
110. *Id.*
111. *Id.* § 9-105.430, para. 4.
112. *Id.* para. 5.
113. *Id.* para. 6.
114. *Id.* para. 5.
115. 1988 Draft Guidelines, *supra* note 11, § 9-105.500.
116. *Id.*

The 1988 Draft Guidelines' spelling out of the "do's and don'ts" of obtaining information about a client's enterprise went a long way toward allaying fears raised by the 1987 Draft Guidelines, which were not quite as specific, and left attorneys to believe that many innocent activities could be the basis of a criminal indictment—which would be made more likely if the client were to cooperate with the prosecutor seeking to indict the attorney.[117] The threat to defense attorneys under 18 U.S.C. § 1957[118] still exists however, although it has diminished somewhat following the 1988 amendments to the statute and the 1988 revisions to the Guidelines.[119] The actual use of the law to impede defense attorneys' activities may well be triggered by the Supreme Court's decisions in the cases discussed in the next section.

IV. APPLICABILITY OF THE SIXTH AMENDMENT: THE FORFEITURE CASES

The sixth amendment provides that in all criminal prosecutions, the accused shall "have the Assistance of Counsel for his defence."[120] Minimal assistance of counsel is not sufficient; rather, the criminal defendant must receive *effective* assistance of counsel.[121] Criminal defense advocates have expressed concern that 18 U.S.C. § 1957, as interpreted by the Justice Department,[122] will have a chilling effect on criminal defense attorneys, making them less willing to defend the accused for fear that they may be implicated in a crime.[123] Furthermore, defense advocates feel that criminal defense attorneys will be less diligent in probing into their clients' activities so as to avoid discovery of the criminal derivation of their fees.[124] In addition, counsel's effective-

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117. Zeese, *Recent Developments*, 2 DRUG L. REP. 71 (1988).

118. 18 U.S.C. § 1957 (Supp. IV 1986).

119. The Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, §§ 6181-6187, 102 Stat. 4181, 4354-4359 (1988) (to be codified in sections of titles 12, 18, 21, and 31 of the U.S.C.).

120. U.S. CONST. amend. VI.

121. Powell v. Alabama, 287 U.S. 45, 53 (1932) ("[D]esignation of counsel . . . [was] so indefinite or so close upon the trial as to amount to a denial of effective and substantial aid in that regard."); Glasser v. United States, 315 U.S. 60 (1942) (where representation of two co-defendants compromised interests of first co-defendant, that defendant was denied his sixth amendment right to effective assistance of counsel); McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970) (sixth amendment right to counsel is "right to effective assistance of counsel."); Strickland v. Washington, 466 U.S. 668, 685 (1984) ("[A]ccused is entitled to be assisted by an attorney . . . who plays the role necessary to ensure that the trial is fair.").

122. *See supra* notes 66-119 and accompanying text.

123. *See* DePetris & Bachrach, *supra* note 21; *see also supra* notes 1, 18, and 20.

124. *See* DePetris & Bachrach, *supra* note 21. *But see supra* text accompanying note 106 for a discussion of the Justice Department's 1988 Draft Guidelines which assure that confidential communications between attorney and client will not provide the basis for prosecution of an attorney under the Act. 1988 Draft Guidelines, *supra* note 11, § 9-

ness in plea bargaining may be compromised if attorneys know that they might later be indicted for accepting payment from their clients.[125] Advocates of an aggressive criminal defense assert that these impediments will have the effect of interfering with the defendant's sixth amendment right to effective assistance of counsel.[126]

A. Round One: Fee Forfeiture Found Unconstitutional in the Fourth Circuit

The concerns of the criminal defense advocates were thoroughly discussed and vindicated in a case that repudiated attorney fee forfeitures under the racketeering statute.[127] In *United States v. Harvey*,[128]

105.430. This provision, however, is contained only in the Guidelines, which have no binding effect, and not in the statute itself.

125. *See infra* notes 235-37 and accompanying text.

126. This is the thrust of the arguments made by defense counsel in cases discussed *infra*.

127. 18 U.S.C. § 1963 (Supp. III 1985). The portion of the statute that the Justice Department views as allowing attorney fee forfeiture reads:

> All right, title, and interest in . . . [criminally derived property] vests in the United States upon the commission of the act giving rise to forfeiture under this section. Any such property that is subsequently transferred to a person other than the defendant may be the subject of a special verdict of forfeiture and thereafter shall be ordered forfeited to the United States, unless the transferee establishes in a hearing . . . that he is a bona fide purchaser for value of such property who at the time of purchase was reasonably without cause to believe that the property was subject to forfeiture under this section.

Id. This provision is nearly identical to 21 U.S.C. § 853(c) (Supp. IV 1986), which provides for forfeiture of property derived from a continuing criminal enterprise.

128. United States v. Harvey, 814 F.2d 905 (4th Cir. 1987), *rev'd sub nom. In re* Forfeiture Hearing as to Caplin & Drysdale, Chartered, 837 F.2d 637 (4th Cir. 1988) (reversal discussed *infra* at notes 154-99 and accompanying text), *aff'd sub nom.* Caplin & Drysdale, Chartered v. United States, 109 S. Ct. 2646 (1989). This case was argued in the Supreme Court in tandem with United States v. Monsanto, 836 F.2d 74 (2d Cir. 1987), *vacated and remanded en banc*, 852 F.2d 1400 (2d Cir. 1988) (per curiam), *rev'd*, 109 S. Ct. 2657 (1989). See *infra* notes 208-55 and accompanying text for a discussion of the Supreme Court's disposition of these cases.

Harvey was a consolidation of three separate appeals: United States v. Bassett, 632 F. Supp. 1308 (D. Md. 1986) (holding that attorney fee forfeiture was not intent of Congress; possible sixth amendment violation acknowledged, although not ruled upon), United States v. Reckmeyer, 631 F. Supp. 1191 (E.D. Va. 1986) (bona fide attorneys' fees not intended by Congress to be subject to forfeiture, except in sham transactions), and United States v. Harvey, No. CR-85-224-A (E.D. Va. Nov. 8, 1985) (restraining order rendering defendant indigent was permissible because defendant received adequate representation by appointed counsel despite order foreclosing payment of legal fees).

The appellant in two of the cases was the United States Government, challenging the lower courts' exemption of "legitimately" earned attorneys' fees from the forfeiture requested by the Government. *Harvey*, 814 F.2d at 911-12. The appellant in the third case was a defendant, Leon Harvey, who claimed that his conviction was the result of a pretrial restraining order that forced him into indigency and denied him counsel of his

the Fourth Circuit Court of Appeals stated that there is a minimal or basic sixth amendment right to some counsel.[129] Beyond that, there is a sixth amendment right to the effective assistance of the counsel who does undertake to represent the defendant;[130] and beyond that, the court determined that the sixth amendment includes a right to counsel of choice.[131]

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choice. *Id.* at 912.

In the *Bassett* case, the indictment included an allegation that the defendants would have to forfeit to the Government any profits derived from their continuing criminal enterprise. *Id.* at 911. Five weeks after the return of the indictment, the prosecutor informed Bassett's attorneys that if the defendants were convicted, he would seek forfeiture of all fees paid by the defendants to their attorneys. *Id.* The district court granted counsel's motion to exempt their fees from the forfeiture count. *Id.*

In *Reckmeyer*, the appellant was the law firm of Caplin & Drysdale (C&D) which represented the defendant, Reckmeyer. Eighteen months after C&D's representation began, Reckmeyer was indicted on a CCE charge. *Id.* The day before the indictment was returned, the Government sought a restraining order barring the transfer of assets covered by the indictment. *Id.* Ten days after the indictment was returned, C&D received $25,840 from Reckmeyer. *Id.* C&D notified the court of its receipt of these funds, and deposited them in a separate escrow account. *Id.* at 911-12. Reckmeyer pled guilty to the three counts of the indictment. *Id.* at 912. The court subsequently granted C&D's request to release the money held in escrow, and other moneys owed to the firm. *Id.*

The lower court's *Harvey* case was based on an indictment of Mr. Harvey which included over 20 counts of violating the racketeering and continuing criminal enterprise statutes. *Id.* On the day of the indictment, the court held an *ex parte* hearing, the result of which was to bar Harvey from using any of his property until the conclusion of his trial and appeals. *Id.* The indictment included the allegation that all of Harvey's assets were criminally derived, and so were forfeitable to the United States Government. *Id.* As a result of the *ex parte* hearing, a restraining order barring Harvey from the use of his property was served on attorney John Mark of the law firm of Zwerling, Mark, Ginsberg & Lieberman, who had already begun to work on Harvey's defense. *Id.* The court acknowledged that the restraining order rendered Harvey indigent and appointed one of his four attorneys to continue his representation. *Id.* Harvey argued that this forced indigency prevented him from receiving an adequate defense. *Id.* at 912. Mr. Harvey asserted that the Federal Government, by denying him such defense, violated his sixth amendment right to effective assistance of counsel, a right which Harvey interpreted as mandating "counsel of choice." *Id.* at 913.

129. *Id.* at 921 (quoting Johnson v. Zerbst, 304 U.S. 458, 462-63 (1938) ("[T]he average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty . . . .")).

130. *Id.* at 921 (quoting McMann v. Richardson, 397 U.S. 759, 771 (1970) ("[I]f the right to counsel . . . is to serve its purpose, defendants cannot be left to the mercies of incompetent counsel, and . . . judges should strive to maintain proper standards of performance by attorneys who are representing defendants in criminal cases in their courts.")); *see also supra* note 121.

131. *Harvey*, 814 F.2d at 921 (citing Powell v. Alabama, 287 U.S. 45, 53 (1932) (in trial of nine black defendants six days after their indictment for rape, judge's vague appointment of "all members of the local bar" denied defendants sufficient time to advise with counsel, prepare their defense, or choose counsel of choice corollary to sixth amendment right as guaranteed by the due process clause of the fourteenth amendment)).

The court recognized that the right to counsel is satisfied by having either privately retained or governmentally appointed counsel, but that private counsel is the preferred manifestation of the right.[132] This manifestation consists of the choosing of one's own counsel and paying him out of one's own private resources up to the limit of those resources, free from governmental interference.[133]

This right—the right to counsel of choice—is counterbalanced by the Government's interest in the orderly administration of justice.[134] This interest, which was asserted by the Government in *Harvey*, most frequently clashes with the defendant's right to counsel of choice when the defendant seeks continuances to preserve his right to particular counsel.[135] Even though the defendants here asserted their right to

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132. *Id.* at 922-23.

133. *Id.* at 923; *accord* Urquhart v. Lockhart, 726 F.2d 1316, 1319 (8th Cir. 1984) ("[A]ccused who is financially able to retain counsel of his choosing must not be deprived of a reasonable opportunity to do so.").

134. *Harvey*, 814 F.2d at 923; *accord* Linton v. Perini, 656 F.2d 207, 209 (6th Cir. 1981) ("[C]ourt must always keep control of its own docket, but in doing so it must be reasonable and consider the constitutional right of a defendant to have retained counsel of his choice."), *cert. denied*, 454 U.S. 1162 (1982); *see also* United States v. La Monte, 684 F.2d 672, 673-74 (10th Cir. 1982) (court's need for administrative convenience outweighed sixth amendment right to counsel of defendant who was able to secure her counsel of choice just minutes before trial began, where "issues are neither demanding nor complex"); United States v. Cicale, 691 F.2d 95, 106-07 (2d Cir. 1982) (after yielding twice on a trial date to accommodate defendant's counsel of choice, court's decision to set a firm trial date, even though attorney of choice would not be available, was not an abuse of discretion), *cert. denied*, 460 U.S. 1082 (1983); United States v. Burton, 584 F.2d 485, 489 (D.C. Cir. 1978) ("[T]he public's interest in the dispensation of justice that is not unreasonably delayed has great force."), *cert. denied*, 439 U.S. 1069 (1979).

135. *Harvey*, 814 F.2d at 923. If the preferred counsel is unavailable at a particular time, the trial court may delay the proceeding until counsel of choice is available. *Id.*; *accord* Ungar v. Sarafite, 376 U.S. 575, 589 (1964) (a "myopic insistence upon expeditiousness in the face of a justifiable request for delay can render the right to defend with counsel an empty formality."); Sampley v. Attorney General, 786 F.2d 610, 612-13 (4th Cir.) ("[A]mong the ways [sixth amendment right to counsel of choice] can be denied is by a court's refusal to continue a scheduled trial when the defendant appears on the scheduled date without counsel."), *cert. denied sub nom.* Sampley v. Thornburg, 478 U.S. 1008 (1986); *see also* Powell v. Alabama, 287 U.S. 45, 59 (1932) ("[D]efendant . . . must not be stripped of his right to have sufficient time to advise with counsel and prepare his defense. To do that is not to proceed promptly in the calm spirit of regulated justice but to go forward with the haste of the mob.").

If this delay becomes unreasonable, courts have held that the defendant's interest in counsel of his own choosing must give way to the Government's need to try the case within a reasonable period of time. *Harvey*, 814 F.2d at 923; *see also Ungar*, 376 U.S. at 590 (in light of all circumstances, five days was enough time to hire an attorney who could prepare an adequate defense); *Sampley*, 786 F.2d at 613 ("[D]efendant has no constitutional right to dictate the time, if ever, at which he is willing to be tried by simply showing up without counsel, or with allegedly unsatisfactory counsel, whenever his case is called for trial.").

counsel in a different context from the continuance setting,[136] the competing interests of the parties must be balanced against one another using the same standards that would apply if a defendant was seeking a continuance to preserve counsel of her choice.[137]

The court interpreted the right to counsel of choice as a right to have a "fair opportunity" to choose one's own counsel.[138] It may be expressed as a "right to be free of arbitrary governmental interference in choosing, paying [for], and retaining the services of privately retained counsel."[139] The court found in *Harvey* that the effect of a freeze order[140]—which made unavailable funds that the Government believed were criminally derived—was to substantially impair the right to counsel.[141] Upon becoming "indigent" in this manner, the defendant may be entitled to appointed counsel. The available force of public defenders, however, is insufficient to properly accomplish the task of providing an adequate defense,[142] and appointed counsel often is unable to mount an effective defense in a complex and lengthy case.[143]

Freeze orders and fee forfeitures (which the Government may impose on an attorney after he or she has been paid using criminally derived funds) may also result in an inability to retain any counsel. No private counsel would accept employment where there is a reasonable probability of nonpayment; yet, the court noted, the defendant could not qualify as indigent because of the availability of some untainted assets.[144] Further, even if private counsel were retained despite the

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136. The defendants asserted that their right to counsel of choice had been denied because the Government had withheld funds that rightfully belonged to the defendants. *Harvey*, 814 F.2d at 911-12.

137. *Compare Harvey*, 814 F.2d at 924 *with* cases cited *supra* at note 134.

138. *Harvey*, 814 F.2d at 923.

139. *Id.* at 924.

140. The freeze order is permitted by 18 U.S.C. § 1963(d)(1)(A) (Supp. IV 1986) and 21 U.S.C. § 853(e)(1)(A) (Supp. IV 1986). 21 U.S.C. § 853(e)(1)(A) reads:

> (1) upon application of the United States, the court may enter a restraining order or injunction, require the execution of a satisfactory performance bond, or take any other action to preserve the availability of property described in subsection (a) of this section for forfeiture under this section—
>
> (A) upon the filing of an indictment or information charging a violation of this subchapter or subchapter II of this chapter for which criminal forfeiture may be ordered under this section 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 . . . .

Id.

141. *Harvey*, 814 F.2d at 924.

142. *Id.* at 921.

143. *Id.* (citing United States v. Rogers, 602 F. Supp. 1332, 1349-50 (1985) (the costs, complexity and length of time involved in mounting a defense under RICO are far beyond the resources or expertise of appointed counsel)).

144. 814 F.2d at 921.

threat of fee forfeiture, the relationship between attorney and client would be compromised by conflicts of interest respecting the possibility of forfeiture.[145] Some courts have interpreted the statute as permitting attorneys to keep fees if they were "bona fide," meaning that the attorney had no reason to believe that they were criminally derived.[146] If counsel's right to get or keep a fee depends upon his or her not having cause to believe that the source of the fee is illicit, the depth of inquiry by counsel into the defendant's conduct will necessarily be limited.[147] The provisions of the Act make counsel's ability to retain fees dependent upon his or her not being fully informed.[148]

Conflicts of interest between attorney and client may also arise respecting the acceptance of plea bargains that would, as a condition for a lighter sentence, dismiss forfeiture counts, thereby preserving the source of attorneys' fees.[149] Despite the duty of zealous representation,[150] the attorney may have more interest in his or her own welfare than in that of the client.

Weighing all of the considerations outlined above, the court in *Harvey* held that the Government's interest in preserving property for forfeiture, and in depriving convicted persons of economic bases for further criminal activity, do not outweigh constitutionally secured individual interests grounded in root assumptions of our adversarial system.[151] Only in cases of sham and fraud should attorneys' fees be forfeited.[152] The forfeiture statute is an indirect denial of the right to the effective assistance of counsel; if the Constitution forbids a direct denial, it must also forbid an indirect one.[153]

B. Round Two: Fee Forfeiture Deemed Constitutional in the Fourth and Second Circuits

Defense attorneys, who believed that they had won a major victory in *Harvey*, were disappointed when the holding of that decision was overturned in *In re Forfeiture Hearing (Caplin & Drysdale, Chartered)*.[154] In combination with a Second Circuit case decided three

145. *Id.*

146. For a discussion of cases, see *infra* note 156.

147. *Harvey*, 814 F.2d at 921.

148. *Id.* at 925.

149. *Id.* at 921.

150. MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 7 (1980).

151. *Harvey*, 814 F.2d at 925.

152. *Id.* at 924, 927. The court here refers to situations in which the attorney is a mere conduit or holding tank for funds which will later be received by another member of the criminal operation, or by the client himself. See *supra* text accompanying notes 91-93 for Justice Department's description of such operations.

153. *Harvey*, 814 F.2d at 924.

154. 837 F.2d 637 (4th Cir. 1988) (en banc), *aff'd sub nom.* Caplin & Drysdale,

weeks earlier, *United States v. Monsanto*,[155] the sixth amendment arguments against fee forfeitures seemed, for a time, to have been buried.[156] *Caplin & Drysdale* seemed an especially powerful indication of the direction in which the courts were going, as it involved a detailed treatment of all the issues by an en banc court consisting of all eleven judges of the Fourth Circuit Court of Appeals.[157] Seven judges joined the majority opinion or concurred;[158] four judges dissented,[159] including

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Chartered v. United States, 109 S. Ct. 2646 (1989) [hereinafter Caplin & Drysdale].

155. 836 F.2d 74 (2d Cir. 1987), *aff'd on reh'g*, 852 F.2d 1400 (2d Cir. 1988) (en banc) (per curiam), *rev'd*, 109 S. Ct. 2657 (1989). In *Monsanto*, the district court judge had issued a restraining order to prevent the defendant from disposing of two parcels of real property, which were specified in an indictment as having been derived from criminal activity. 836 F.2d at 76. An attorney appeared before the trial judge to present Monsanto's claim that the possible unavailability of attorney fees—which defendant had planned to raise from the sale of the detained property—had deterred defendant's usual attorney from appearing on behalf of the defendant. *Id.* The judge instructed that counsel of choice could represent the defendant and be paid from restrained assets, but only to the level of remuneration provided in the Criminal Justice Act, 18 U.S.C. § 3006A (1982 & Supp. IV 1986). *Id.* Monsanto was rendered de facto indigent by his inability to use his property. *Id.* No trial attorney would represent Monsanto for the fees set by the Criminal Justice Act.

156. At the time of these two cases, no circuit court had held that fee forfeitures were impermissible under the sixth amendment. However, the Fifth Circuit in United States v. Thier, 801 F.2d 1463 (5th Cir. 1986), *modified*, 809 F.2d 249 (5th Cir. 1987), stated that the qualified right to counsel is a factor for the trial court to consider in deciding whether to exempt attorney fees from a restraining order. The court further found that Congress had not intended forfeiture of assets needed for an adequate defense, and did not allow forfeiture on that basis. 801 F.2d at 1474.

Additionally, several district court cases interpreting the fee forfeiture statute rejected application of the statute to attorneys' fees because of language in the statute which excludes "bona fide purchaser[s] for value . . . who at the time of purchase [were] reasonably without cause to believe that the property was subject to forfeiture . . . ." 18 U.S.C. § 1963(c) (Supp. IV 1986) and 21 U.S.C. § 853(c) (Supp. IV 1986). These courts held that attorneys, when paid for actual services, are per se bona fide recipients of funds. *See, e.g.*, United States v. Estevez, 645 F. Supp. 869, 872 (E.D. Wis. 1986) ("Congress intended that legitimate attorney fees be excepted"); United States v. Ianniello, 644 F. Supp. 452, 455-56 (S.D.N.Y. 1985) ("[B]ona fide attorneys' fees paid to defense counsel . . . were not intended to be forfeitable by Congress . . . ."); United States v. Badalamenti, 614 F. Supp. 194, 198 (S.D.N.Y. 1985) ("[S]tatute was not intended, and should not be construed to reach bona fide fees charged by the attorney for the defense of the criminal charge."); United States v. Rogers, 602 F. Supp. 1332, 1348 (D. Colo. 1985) ("Congress did not intend to include in those items forfeitable the compensation already paid for goods and services legitimately provided."). These cases were criticized in *Harvey* for ignoring the plain meaning of the statute. *Harvey*, 814 F.2d at 913.

157. 837 F.2d at 637.

158. Wilkinson, J. writing for the majority, *id.* at 640, was joined by Russell, Hall, Chapman, and Wilkins, J.J. *Id.* at 639. Widener, J., concurred in a separate opinion, *id.* at 649, and Murnaghon, J., concurred in a separate opinion. *Id.* at 650.

159. *Id.* at 651 (Phillips, J., dissenting). Phillips was joined by Winter, C.J., Sprouse and Ervin, J.J. *Id.* at 638.

the author of the original panel decision in *Harvey*.[160] However, the Second Circuit agreed in February 1988 to review *Monsanto* en banc;[161] and, later in that same year, it vacated and remanded the three-judge panel's earlier decision.[162] The Supreme Court agreed to review the two cases in tandem,[163] and its decisions therein are currently the clearest statements of the extent to which the Government may indirectly impede criminal defendants' attainment of the effective assistance of counsel.

Both the Second and Fourth Circuits,[164] in finding no sixth amendment rights impinged by the Government's actions, held that the right to representation is an immutable principle of justice implicit in due process.[165] A criminal defendant has the right to be represented either by retained counsel or by appointed counsel.[166] No reason is sufficient to allow a criminal defendant to stand trial without counsel.[167]

The sixth amendment right to counsel includes the right to "privately retained counsel of choice."[168] The right to counsel of choice is, however, a qualified right which may be outweighed by competing governmental interests.[169] One such interest is in restraining property to

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160. 814 F.2d at 908 (Phillips, J., writing for the majority).

161. *En Banc Circuit Court to Review Monsanto Case*, N.Y.L.J., Feb. 9, 1988, at 5, col. 3.

162. *Monsanto*, 852 F.2d 1400 (2d Cir. 1988) (en banc) (per curiam) (discussed *infra* notes 200-07 and accompanying text).

163. *Caplin & Drysdale*, 109 S. Ct. 363 (1988); *Monsanto*, 109 S. Ct. 363 (1988) (granting certiorari to hear the cases in tandem).

164. *Monsanto*, 836 F.2d 74 (2d Cir. 1987); *Caplin & Drysdale*, 837 F.2d 637 (4th Cir. 1988).

165. *Caplin & Drysdale*, 837 F.2d at 643 ("[T]he right to representation is fundamental to our system and universally recognized as an 'immutable principal of justice' implicit in due process.") (quoting Powell v. Alabama, 287 U.S. 45, 71 (1932)); *Monsanto*, 836 F.2d at 85 ("[T]he right to retain private counsel of choice is not absolute; and, in the event that the defendant does not prevail at a post-restraint hearing, he is still guaranteed appointed counsel under the sixth amendment.").

166. *Caplin & Drysdale*, 837 F.2d at 643.

167. *Id.*

168. *Monsanto*, 836 F.2d at 80 (quoting United States v. Curcio, 694 F.2d 14, 22-23 (2d Cir. 1982) ("[A]ccused who is financially able to retain counsel must not be deprived of opportunity to do so.")).

169. *Monsanto*, 836 F.2d at 80 (citing United States v. Paone, 782 F.2d 386 (2d Cir. 1986) (defendant requested new counsel after revelation that present counsel had represented a current witness against defendant seven years earlier; court found no prejudice to defendant in retaining attorney, no absolute right to attorney of choice, and a disruption of proceedings and administration of justice if request for new attorney had been granted), *cert. denied*, 483 U.S. 1019 (1987); and *In re* Grand Jury Subpoena Served Upon Doe, 781 F.2d 238 (2d Cir. 1985) (en banc) (subpoena issued to attorney ordering him to reveal fee-payment information that could establish client as leader of criminal enterprise; no sixth amendment violation even if attorney, who had represented client for nearly 18 years, could be disqualified from future representation of client, as there is

"prevent the flight of forfeitable assets."[170] "The strictures of due process do not . . . convey an absolute right to be free of pretrial deprivations, just as the procedural protections of the Fourth Amendment do not convey an absolute right to hold one's property free of lawful searches and seizures."[171] If an accused can retain counsel through his or her own resources or by securing aid from family or friends, he or she has the right to be represented by his or her attorney of choice.[172] Defendants who lack their own assets must, however, "be satisfied with appointed counsel, over whose selection they may have little influence."[173]

The courts rejected claims that the sixth amendment bars proceedings that render a defendant indigent. When a defendant becomes indigent, the sixth amendment's requirements are satisfied by appointed counsel.[174] The Fourth Circuit panel also rejected the assertion that cases involving racketeering and continuing criminal enterprises are so complex that no court-appointed attorney could possibly present an adequate defense.[175]

Caplin & Drysdale had contended that fee forfeiture—or restraint of property with the effect of depriving defendant the ability to pay his lawyer—amounts to governmental interference with the attorney-client relationship.[176] The law firm suggested that the attorney's desire to

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no absolute right to counsel of choice), *cert. denied sub nom.* Roe v. United States, 475 U.S. 1108 (1986)). *Cf.* United States v. Cancilla, 725 F.2d 867 (2d Cir. 1984) (sixth amendment was violated when defendant was represented by counsel who had engaged in a crime similar to that of defendant and had conspired with a possible co-conspirator of defendant; lack of vigorous defense may have been caused by counsel's fear of further revelation of his own crimes); Solina v. United States, 709 F.2d 160 (2d Cir. 1983) (defendant's sixth amendment rights violated when counsel for defendant was not licensed as an attorney).

170. *Caplin & Drysdale*, 837 F.2d at 643.

171. *Id.* at 643-44 (citing Warden Maryland Penitentiary v. Hayden, 387 U.S. 294, 301-02 (1967) (permitting seizure of fruits and instrumentalities of crime, as well as of 'mere evidence')).

172. 837 F.2d at 644 (citing United States v. Inman, 483 F.2d 738 (4th Cir. 1973)).

173. 837 F.2d at 645 (citing Tague, *An Indigent's Right to the Attorney of His Choice*, 27 STAN. L. REV. 73 (1974)).

174. 837 F.2d at 646 (citing United States v. Brodson, 241 F.2d 107, 110-11 (7th Cir.) (jeopardy assessment against taxpayer which prevented retention of counsel violated sixth amendment; distinction between indigency and "government imposed" indigency is immaterial), *cert. denied*, 354 U.S. 911 (1957); United States v. Marshall, 526 F.2d 1349 (9th Cir. 1975) (alternative funds for counsel need not be made available to a defendant whose assets were under a tax levy, unless prosecutorial misconduct could be shown), *cert. denied*, 426 U.S. 923 (1976); United States v. Allied Stevedoring Corp., 138 F. Supp. 555 (S.D.N.Y. 1956) (funds need not be released from tax levy so that a corporation can pay for counsel of choice)).

175. 837 F.2d at 646-47.

176. *Id.* at 647.

preserve a fee may run counter to the client's needs in this situation.[177] The Fourth Circuit rejected the notion that the statute would, per se, violate the sixth amendment on these grounds. The court cited *United States v. Morrison*,[178] which held that "remedies [for alleged sixth amendment violations] should be tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests."[179] Absent a showing of harm to defendant, no relief should be granted. The Fourth Circuit could envision no such harm in *Caplin & Drysdale*, as it "refuse[d] to presume" that defense attorneys would act unethically in an attempt to preserve their fee—such as by accepting a plea bargain for a higher sentence than might otherwise have resulted, in return for the preservation of the attorney fee.[180]

The court in *Caplin & Drysdale* also countered a claim by the law firm that prosecutors will abuse their ability to hamper the transferral of a defendant's property.[181] The law firm feared that prosecutors would detain more property than was needed to satisfy the Government's claim—including property not likely to be the fruit of illegal activity. The court insisted that the possibility of such abuse is not sufficient to render all forfeitures unconstitutional, since the courts are adequately prepared to rectify abuses of the system.[182] Such abuses must be dealt with, however, on the specific facts of the situation.[183]

The Second Circuit, in *United States v. Monsanto*,[184] conditioned its rejection of the defendant's sixth amendment argument on a requirement that, when forfeiture affecting funds earmarked for the attorney is requested, there be a special hearing concerning "forfeiture-related restraining orders."[185] At this hearing, if the Government meets

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177. *Id.*

178. 449 U.S. 361 (1981).

179. *Id.* at 364. The court also cited Weatherford v. Bursey, 429 U.S. 545 (1977) (holding that an undercover agent's meeting with defendant and his attorney prior to trial, at which trial is discussed and agent's identity is not revealed, is not per se violation of right to counsel; demonstrable harm to defendant must be shown).

180. *Caplin & Drysdale*, 837 F.2d at 647 (citing Evans v. Jeff D., 475 U.S. 717 (1986) (stating that the waiver of attorneys' fees in section 1983 cases will not necessarily cause attorneys to act against their clients' interests in order to preserve their fees)).

181. 837 F.2d at 643.

182. *Id.* at 648.

183. *Id.*

184. 836 F.2d 74 (2d Cir. 1987), *vacated per curiam*, 852 F.2d 1400 (2d Cir. 1988) (en banc), *rev'd*, 109 S. Ct. 2657 (1989).

185. 836 F.2d at 82. The court found support for such a hearing in United States v. Harvey, 814 F.2d 905, 929 (4th Cir. 1987), *rev'd sub nom. In re* Forfeiture Hearing as to Caplin & Drysdale, Chartered, 837 F.2d 637 (4th Cir. 1988), *aff'd sub nom.* Caplan & Drysdale, Chartered v. United States, 109 S. Ct. 2646 (1989) ("[T]o the extent the Act authorizes the issuance of *ex parte* restraining orders after indictment without any post-deprivation hearing other than a criminal trial, it violates fifth amendment due process guarantees . . . ."); United States v. Thier, 801 F.2d 1463 (5th Cir. 1986) (requiring a

its burden of proving a reasonable likelihood that the funds will ultimately be found forfeitable, the defendant is put in the same position as one who was indigent or had limited funds in the first place.[186] The court stated that:

> [N]o constitutional principle requir[es] that a defendant whose ability to pay private counsel results solely from the possession of property which he has acquired by criminal activity, which property Congress has declared to be forfeitable, must be placed in a position preferable to that of an indigent defendant who does not have such property at his disposal.[187]

If the Government fails to meet its burden, the defendant may freely use his funds to pay attorneys' fees without fear of post-trial forfeiture, even if the Government demonstrates at trial that the property was forfeitable.[188]

The Fourth Circuit in Caplin & Drysdale[189] suggested a method by which claims of ineffective assistance of counsel may be adjudicated: the "well-established" way described by *Strickland v. Washington*.[190] After prosecution has concluded, an inquiry may be held to look into the particular prosecution in which the defendant was allegedly ill-

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hearing at which the government must show (1) substantial likelihood that it will prevail on the merits of the claims, (2) that injunction is necessary to avoid irreparable injury to government's interests, (3) that harm to government outweighs potential injury to defendants, and (4) that the public interest would be served by issuing a restraining order), *modified*, 809 F.2d 249 (5th Cir. 1987) (en banc); United States v. Crozier, 777 F.2d 1376 (9th Cir. 1985) (21 U.S.C. § 853(e)(1) violates fifth amendment due process right because of failure to provide for hearing on a restraining order before trial or conviction); United States v. Lewis, 759 F.2d 1316, 1324-25 (8th Cir.) (" '[D]eterminations must be made on the basis of a full hearing; the government cannot rely on indictments alone.' ") (quoting United States v. Long, 654 F.2d 911, 915 (3d Cir. 1981)), *cert. denied sub nom.* Milburn v. United States, 474 U.S. 994 (1985); United States v. Spilotro, 680 F.2d 612 (9th Cir. 1982).

186. *Monsanto*, 836 F.2d at 85.

187. *Id.* at 85. The dissent foresaw a problem in finding an attorney for the defendant at the forfeiture hearing. *Id.* at 86-87 (Oakes, J., dissenting).

188. *Id.* at 84-85 ("[T]o the extent that some funds ultimately found to be forfeitable at trial will remain in the hands of attorneys, we view this as a necessary cost in this difficult balance between the interests of the government and the defendant's sixth amendment right to counsel of choice.").

189. 837 F.2d 637 (4th Cir. 1988), *aff'd sub nom.* Caplin & Drysdale, Chartered v. United States, 109 S. Ct. 2646 (1989).

190. 466 U.S. 668 (1984). *Strickland* advised that the reviewing court must presume that representation fell within the "wide range of reasonable professional assistance." The circumstances of the representation must be viewed from "counsel's perspective at the time." Defendant must identify specific acts or omissions of counsel that were not reasonable under the circumstances. The court must then apply the wide range of permissible conduct to the actual conduct engaged in, and determine whether the conduct fits within that wide range. *Id.* at 689-90.

served.[191]

The Fourth Circuit added a new perspective to the constitutional argument by asserting that exempting, per se, attorneys' fees from forfeiture would create a caste system among criminals: those who attained the greatest illicit wealth would get the best representation; those who stole less would receive adequate representation; those whose crimes did not produce income would endure the worst representation.[192] In the court's view, "[a]n outright exemption of attorneys' fees from forfeiture would impose a regime of stark inequality whereby those most successful in harvesting the fruits of criminal activity would be those most able to secure representation others are not constitutionally guaranteed and cannot personally afford."[193] Without so stating, the court appeared to be invoking an equal protection argument: the court would not favor the grand thief over the petty thief, the drug wholesaler over the street dealer.

The Fourth Circuit looked to Congress to make changes in the statute.[194] Congress's intent, said the court, was not to exempt attorneys' fees.[195] If Congress wishes to change the law that is its prerogative,[196] but the courts cannot "creat[e] a new constitutional right."[197]

The three-judge panel in *Monsanto*, and the en banc court in *Caplin & Drysdale*, made reasoned analyses of the intent of Congress in passing the forfeiture statutes, and the logical implications of applying a per se ban on forfeitures that affect attorneys' fees. The reasoning of these courts is impeccable, as it compares the ability of an indigent defendant to receive adequate representation with the ability of a defendant with tainted funds to do the same. Each may hire the attorney of his choice, provided he can afford such attorney with assets not subject to an overriding claim by the Government.[198] Each defendant may also be unable to hire her attorney of choice and forced to settle for an attorney paid by the state. Allowing the defendant with tainted funds to use those funds would tend to reward the person accused of the greater crime. The courts' premises, however, are subject to question; these questions were addressed by the Second Circuit, sitting en banc, when it vacated the three-judge panel's holding in *United States v. Monsanto*.[199]

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191. *Caplin & Drysdale*, 837 F.2d at 647.
192. *Id.* at 646.
193. *Id.*
194. *Id.* at 648-49.
195. *Id.* at 641. *But see supra* note 65.
196. 837 F.2d at 648.
197. *Id.* at 649.
198. *See supra* text accompanying notes 138-40.
199. 852 F.2d 1400 (2d Cir. 1988) (en banc) (per curiam), *vacating and remanding* 836 F.2d 74 (2d Cir. 1987), *rev'd*, 109 S. Ct. 2657 (1989).

C. Round Three: The Circuits Split, as the En Banc Second Circuit Finds Forfeiture Either Unconstitutional, or Not Authorized by the Statute

The Second Circuit, in its en banc review of the *Monsanto* decision, left the constitutional questions raised by the defendant less settled than they were before its decision. The twelve judges handed down eight decisions,[200] only one of which commanded a majority of the court. Eight judges required that the case be remanded to the district court with an order that the restrained funds be invaded to provide sufficient funds to pay Monsanto's attorney of choice.[201] Three judges would have let the three-judge panel's decision stand.[202] One judge would have remanded the case, but in all other respects believed that the statute was valid, and that attorneys should not be paid with

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200. (1) Chief Judge Feinberg, joined by Judges Oakes and Kearse, concurred in the per curiam opinion, *Monsanto* 852 F.2d at 1402; (2) Judge Oakes concurred, *id.* at 1404; (3) Judge Winter, joined by Judges Meskill and Newman, concurred, *id.* at 1405; (4) Judge Miner, joined by Judge Altimari, concurred in part and dissented in part, *id.* at 1411; (5) Judge Mahoney, joined in part by Judges Cardamone and Pierce, dissented, *id.* at 1412; (6) Judge Pierce, joined by Judge Cardamone, concurred in part and dissented in part, *id.* at 1418; (7) Judge Cardamone, joined by Judge Pierce, concurred in part and dissented in part, *id.* at 1419; and (8) Judge Pratt concurred in part and dissented in part, *id.* at 1420.

201. *Id.* at 1402. Chief Judge Feinberg, along with Judges Oakes and Kearse, declared the forfeiture provisions unconstitutional in their effect on the right to obtain counsel of choice. *Id.* at 1405. Judge Winter, joined by Judges Meskill and Newman, held that the sixth amendment need not be construed, because judges have equitable power under the statute to provide for necessities, one of which is the necessity to obtain adequate representation. *Id.* at 1405-11 (noting further that in balancing the Government's interest in preventing improper disposition of forfeitable assets against the defendant's need to be represented, the defendant's interest should prevail), *id.* at 1406. Judges Miner and Altimari believed that the courts cannot require a hearing to determine the forfeitability of assets; such a requirement must be Congressionally mandated. The statute, since it does not provide for a post-indictment hearing, thus infringes fifth amendment due process rights. *Id.* at 1411-12.

202. Judges Mahoney, Cardamone, and Pierce would have allowed the three-judge panel's decision to stand. They found no constitutional dilemma and had no difficulty interpreting the statute to require the forfeiture of property to be used to pay attorneys' fees. Judge Mahoney's opinion quoted United States v. Nichols, 841 F.2d 1485 (10th Cir. 1988), which said, "[i]t is hard to conceive of a legal system in which appointed counsel is routinely adequate in a death penalty case, but is somehow inadequate in a case involving [a] career criminal millionaire." *Monsanto*, 852 F.2d at 1416 (quoting 841 F.2d at 1507).

Judges Cardamone and Pierce each wrote separate opinions elaborating on their agreement and minor differences with Judge Mahoney's decision. Judge Mahoney would, after a trial in which the defendant's property was found to be criminally derived, have exempted from forfeiture only those fees which were subject to a pretrial hearing and exempted. *Monsanto*, 852 F.2d at 1418. Judges Cardamone and Pierce, on the other hand, would have exempted from postconviction forfeiture *all* fees legitimately paid to an attorney. *Id.* at 1418-19.

tainted funds.[203]

Because the opinions of the judges have little unanimity, the holding of the case is little more than an order without explanation. The en banc Second Circuit commanded that the case be remanded with instructions to modify the restraining order to permit Monsanto access to restrained assets to the extent necessary to pay legitimate (that is, non-sham) attorney's fees in connection with the criminal charges against him.[204] Moreover, the court stated that "any such fees paid to Monsanto's defense counsel are exempt from subsequent forfeiture pursuant to 21 U.S.C. § 853(c)."[205] The judges, having issued their order, went on to explain the law as they understood it, but their opinions shared little in common. Judge Feinberg's opinion examined in depth the sixth amendment implications of pretrial restraint of the defendant's assets,[206] but holds little precedential weight since only three judges agreed with it.[207]

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203. Judge Pratt concurred with the per curiam opinion "insofar as it reverses the order of the district court and remands the case." *Id.* at 1420. However, in all respects, he agreed with those judges who would uphold the three-judge panel's decision and disagreed with those who voted to remand the case. *Id.* His grounds for voting for remand are less than clear.

204. *Id.* at 1402.

205. *Id.*

206. Judge Feinberg made the following points: "The sixth amendment right to counsel of choice is a fundamental right that serves to protect other constitutional rights." *Id.* at 1402. The sixth amendment "is a key element in our system of criminal justice" which sets this system apart from "others that do not allow individuals the chance to resist in a meaningful way the imposition of government power upon them." *Id.* "Therefore, the right to counsel of choice cannot be infringed unless a *compelling governmental purpose* outweighs it." *Id.* (emphasis added). The sixth amendment right in this case is destroyed almost completely "by depriving the defendant of the means to retain counsel of choice prior to commencement of trial." *Id.* The Government's need to justify the drastic action of restraining funds needed to pay an attorney must be "overwhelmingly persuasive" in order to defeat right to counsel of choice. *Id.* Here, however, the Government's need is "not all that compelling." *Id.* The Government's interest is not so strong as to prevent assets from being used to hire an attorney. *Id.* at 1403. This does not prevent the Government "from freezing an indicted defendant's *other* assets—those not necessary for payment of counsel—so that there will be no dissipation or concealment of those." *Id.* (emphasis in original). But the Government's interest in "weakening the accused's ability to defend" him or herself is "not a legitimate government interest that can be used to justify the invasion of a constitutional right." *Id.* And finally, "[t]he small societal cost of allowing criminals to use their illegally obtained wealth to hire an attorney . . . is the price we must pay for protecting the rights of the innocent, who might otherwise be deprived of legitimate economic power in waging a full defense." *Id.*

207. *See supra* note 200.

D. Supreme Court Review

The kindred cases of *Monsanto* and *Caplin & Drysdale* were decided by the Supreme Court on the same day.[208] Each opinion refers to the other opinion's coverage of particular issues,[209] so that the two together may be read as a single definitive opinion on the issue of preconviction restraint or postconviction forfeiture of funds that deprives defendants of the ability to pay counsel. The two opinions share a common dissent,[210] and were both decided by identical 5-4 splits, with Justice White writing the majority opinions, joined by Chief Justice Rehnquist and Justices O'Connor, Scalia, and Kennedy. The majority focused, in *Monsanto*, on statutory interpretation, while saving constitutional holdings for its opinion in *Caplin & Drysdale*. This discussion, therefore, focuses on the Supreme Court's interpretation of the sixth amendment in *Caplin & Drysdale*.

The Supreme Court placed strict limits on claims under the sixth amendment, stating: "[w]hatever the full extent of the Sixth Amendment's protection of one's right to retain counsel of his choosing, that protection does not go beyond 'the individual's right to spend his own money to obtain the advice and assistance of . . . counsel.' "[211] The Court firmly rejected the argument that, under either the sixth amendment or a statutory interpretation, attorneys' fees should be exempt from forfeiture, and in several passages mocked the notion that such a claim had any validity. For example, in commenting on the respondents' assertion that congressional silence on the issue of attorneys' fees in the applicable statute indicated congressional recognition that forfeiture was not meant to apply to attorneys' fees, the Court jested:

> [Congress is] similarly silent on the use of forfeitable assets to pay stock-broker's fees, laundry bills, or country club memberships . . . . Congress' failure to supplement § 853(a)'s comprehensive phrase — "any property" — with an exclamatory "and we even mean assets to be used to pay an attorney" does not lessen the force of the statute's plain language.[212]

Similarly derisive was the statement that "[t]here is no constitutional

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208. United States v. Monsanto, 109 S. Ct. 2657 (1989); Caplin & Drysdale, Chartered v. United States, 109 S. Ct. 2646 (1989).

209. *See, e.g.*, *Monsanto*, 109 S. Ct. at 2666; *Caplin & Drysdale*, 109 S. Ct. at 2651.

210. The dissenting opinions in the *Monsanto* and *Caplin & Drysdale* cases were written by Justice Blackmun, who was joined by Justices Brennan, Marshall, and Stevens. The dissents follow the *Monsanto* opinion, and have been consolidated as Caplin & Drysdale, Chartered v. United States v. Monsanto, 109 S. Ct. 2667 (1989).

211. *Caplin & Drysdale*, 109 S. Ct. at 2652 (quoting the dissent by Stevens, J., in Walters v. National Ass'n of Radiation Survivors, 473 U.S. 305, 370 (1985)).

212. *Monsanto*, 109 S. Ct. at 2663 (emphasis in original).

principle that gives one party the right to give another's property to a third party, even where the person seeking to complete the exchange wishes to do so in order to exercise a constitutionally protected right."[213]

Monsanto argued that a canon of judicial interpretation urges courts to construe statutes to avoid decision as to their constitutionality, and therefore, the Supreme Court should interpret the applicable statute so as to avoid confronting the constitutional claims. Justice White tendered respect for interpretative canons, but said that they are often useful in "close cases."[214] Despite the strong dissent offered by the four-member minority, these were not, in the majority's opinion, close cases.

The majority characterized defendants'[215] argument as stating "that the forfeiture law makes impossible, or at least impermissibly burdens, a defendant's right 'to select and be represented by one's preferred attorney,' "[216] and that "[a] violation of the Sixth Amendment arises here because of the forfeiture, at the instance of the Government, of assets that defendants intend to use to pay their attorneys."[217] The Court went on to observe:

> [T]here will be cases where a defendant will be unable to retain the attorney of his choice, when that defendant would have been able to hire that lawyer if he had access to forfeitable assets, and if there was no risk that fees paid by the defendant to his counsel would later be recouped under § 853(c). It is in these cases, petitioner argues, that the Sixth Amendment puts limits on the forfeiture statutes.[218]

In response, the majority raised the relation-back theory;[219] that is, the property that the defendant would pay to his or her attorney belongs, in reality, to the Government, and was vested in the Government at the time that the crime was committed. The Government's

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213. *Caplin & Drysdale*, 109 S. Ct. at 2653-54 (referring to the allegedly criminally derived property as belonging to a third party, i.e., the United States under the relation-back theory). *See infra* text accompanying note 219 for a discussion of the relation-back theory.

214. *Monsanto*, 109 S. Ct. at 2664.

215. The parties representing the interests of criminal defendants in the two Supreme Court cases were respondent/defendant Monsanto in the *Monsanto* case, and petitioner/law firm Caplin & Drysdale, Chartered in *Caplin & Drysdale*. Because both parties represent the interests of criminal defendants generally, they will hereinafter be referred to as "defendants."

216. *Caplin & Drysdale*, 109 S. Ct. at 2651-52 (quoting Wheat v. United States, 486 U.S. 153, 159 (1988)).

217. 109 S. Ct. at 2652.

218. *Id.*

219. 18 U.S.C. § 1963(c) (Supp. IV 1986); 21 U.S.C. § 853(c) (Supp. IV 1986).

right to protect its property supersedes the right of a criminal defendant to use property arguably his or her own to pay an attorney.[220]

The Supreme Court viewed defendants' right to use this property as no more valid than the right of a bank robber to use the proceeds of his or her misdeeds to pay for a defense.[221] In anticipation of this holding, the defendants had argued:

> [T]he bank's claim to robbery proceeds rests on "pre-existing property rights," while the Government's claim to forfeitable assets rests on a "penal statute" which embodies the "fictive property-law concept of . . . relation-back" and is merely "a mechanism for preventing fraudulent conveyances of the defendant's assets, not . . . a device for determining true title to property."[222]

The Court, however, relied on history to refute this assertion. Property vested in the government is not a mere fictive concept; rather, the statute authorizing forfeiture "reflects the application of the long-recognized and lawful practice of vesting title to any forfeitable assets, in the United States, at the time of the criminal act giving rise to forfeiture."[223] The Supreme Court then restated its basic assertion that: (1) the property belonged to the United States; and (2) the property therefore could not be used to pay attorneys' fees.

The Supreme Court saw no difference between using the assets to pay for an attorney, and using the assets to exercise the right to travel, speak, or practice one's religion.[224] The sixth amendment right is, therefore, no greater than the right under the first amendment, which the Court is likewise unwilling to recognize if it involves spending the United States's money. In the Court's view, if the interests of the opposing parties (United States and defendants) in these cases were to be balanced, the scales would clearly tip in favor of the governmental interests. It enumerated the interests of the United States in retaining potentially criminally derived assets:

> (1) The money is placed in a fund that supports law enforcement efforts, thereby benefiting all citizens;
> (2) The money is preserved so as to be returned to rightful owners, if any such owners exist;
> (3) The economic power of organized crime, including the economic power to retain private counsel, is lessened.[225]

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220. *Caplin & Drysdale*, 109 S. Ct. at 2653.
221. *Id.* at 2652-53.
222. *Id.* at 2653 (quoting from Brief for Petitioner at 40-41).
223. 109 S. Ct. at 2653.
224. *Id.* at 2654.
225. *Id.*

Although defendants urged that these interests are "modest,"[226] the Court held that they "override[] any Sixth Amendment interest in permitting criminals to use assets adjudged forfeitable to pay for their defense."[227] It thus "reject[ed] petitioner's claim of a Sixth Amendment right of criminal defendants to use assets that are the government's—assets adjudged forfeitable . . .—to pay attorneys' fees, merely because those assets are in their possession."[228]

The majority ended its opinion by denigrating the claim that the right to due process was violated because the statute upsets the balance of power between prosecution and defense. The defendants had argued that the statute allows the prosecution to wield enormous power, toppling the regime of rough equality that previously existed.[229] Since the prosecution could choose to pursue forfeiture or refrain from doing so, the prosecution in effect could control the selection of defendant's counsel. The Court, while admitting that the prosecution could abuse its power noted that many tools available to prosecutors could be abused, and that this was not sufficient to invalidate the statute.[230]

The dissent had a very different idea of the purposes of the statute, of the governmental interest, and of the scope of sixth amendment protection afforded to criminal defendants. On every point, Justice Blackmun's harsh dissent refuted the majority's holding, providing a pointed commentary on the reasonableness of their judgment. In the minority's view, the majority's decision was divorced from the reality faced by criminal defendants and their attorneys. It would be far better for the majority to "heed the warnings of our district court judges, whose day-to-day exposure to the criminal-trial process enables them to understand, perhaps far better than [Supreme Court Justices], the devastating consequences of attorney's fee forfeiture for the integrity of our adversarial system of justice."[231]

Unlike the majority, the minority determined that substantial constitutional issues were raised in these cases,[232] and found that the statute could and should be interpreted to avoid those issues.[233] The minority was offended at the majority's trivializing of the sixth amendment right. "That the majority implicitly finds the Sixth Amendment right to counsel of choice so insubstantial that it can be

226. *Id.*
227. *Id.* at 2655.
228. *Id.* at 2656.
229. *Id.* at 2656-57.
230. *Id.* at 2657.
231. Caplin & Drysdale, Chartered v. United States, 109 S. Ct. at 2667 (Blackmun, J., dissenting).
232. *Id.* at 2772.
233. *Id.* at 2671-72.

outweighed by a legal fiction[234] demonstrates, still once again, its ' "apparent unawareness of the function of the independent lawyer as a guardian of our freedom." ' "[235]

After reviewing the history of Supreme Court decisions advancing the goal of providing to every criminal defendant effective assistance of counsel,[236] Justice Blackmun discussed the ways by which retention of private, independent counsel fosters "the trust between attorney and client that is necessary for the attorney to be a truly effective advocate"[237]:

> [T]he defendant's perception of the fairness of the process, and his willingness to acquiesce in its results, depend upon his confidence in his counsel's dedication, loyalty, and ability . . . . When the Government insists upon the right to choose the defendant's counsel for him, that relationship of trust is undermined: counsel is too readily perceived as the Government's agent rather than his own.[238]

As further problems, the dissent points to the disruption of the "modicum of equality" between prosecution and defense; the unwillingness of pro bono attorneys to take on a defense in a long and complex case; and the likely exodus of talented attorneys from the criminal bar.[239] Any attorney who would handle a case without some likelihood of payment would, in the Court's view, have to be "foolish, ignorant, beholden or idealistic . . . ."[240] Alternatively, the defense attorney might be willing to accept the case on a contingency basis, thereby violating ethical rules.[241]

Another possibility is that the attorney might attempt to prove

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234. *See supra* text accompanying note 223, regarding the purported "fictive concept."

235. 109 S. Ct. at 2672 (Blackmun, J., dissenting) (citing Wheat v. United States, 486 U.S. 153 (1988) (Stevens, J., dissenting) (quoting Walters v. National Ass'n of Radiation Survivors, 473 U.S. 305, 371 (1985) (Stevens, J., dissenting)).

236. 109 S. Ct. at 2672 (Blackmun, J., dissenting) (discussing Powell v. Alabama, 287 U.S. 45 (1932) (requiring a fair opportunity to secure counsel); Chandler v. Fretag, 348 U.S. 3 (1954) (discussing whether defendant's right to secure counsel and pay him or her with defendant's own funds was outer limit of right to counsel); Gideon v. Wainwright, 372 U.S. 335 (1963) (requiring appointed counsel for indigents); and Strickland v. Washington, 466 U.S. 668 (1984) (requiring minimally effective assistance of counsel)).

237. 109 S. Ct. at 2672 (Blackmun, J., dissenting).

238. *Id.* at 2673 (citation omitted).

239. *Id.* (citations omitted).

240. *Id.* at 2675 (quoting United States v. Badalamenti, 614 F. Supp. 194, 196 (S.D.N.Y. 1985)).

241. *Id.* at 2675 (Blackmun, J., dissenting); *see also* MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 2-20, DR 2-106 (1974); MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.5(d)(2) (1983).

him or herself a "bona fide purchaser for value" under the terms of the Act.[242] To do so, the attorney would have to be ignorant of the source of the funds. The necessity to preserve such ignorance would lead to a less penetrating inquiry into the client's circumstances, and could preclude the pursuance of a defense that might have become possible as a result of such searching inquiry.[243]

One further compromise that the attorney might be tempted to make would arise during the plea negotiations. The prosecutor is enabled, by fee forfeiture provision, to offer a deal that would allow the attorney to keep the fees he or she earned, in return for a plea agreement—"a position which conflicts with [the] client's best interests."[244]

Justice Blackmun also warned of the dangers of "socialization" of criminal defense, leading to standardization of defenses offered, and stagnation in the development of the varied legal doctrines required for novel circumstances:[245]

> There is a place in our system of criminal justice for the maverick and the risk-taker, for approaches that might not fit into the structured environment of a public defender's office, or that might displease a judge whose preference for nonconfrontational styles of advocacy might influence the judge's appointment decisions.[246]

The fee forfeiture statutes, therefore, "force[] [the criminal defense attorney] to operate in an environment in which the Government is not only the defendant's adversary, but also his own."[247] The statutes "undermine[] every interest served by the Sixth Amendment right to chosen counsel, on the individual and institutional levels, over the short term and the long haul."[248]

Having made a powerful case for the undermining of the defendants' interests, Justice Blackmun went on to minimize the Government's interest in preserving assets. The minority defined the Government's interest as "safeguarding fictive property rights . . . which hardly weigh[] at all against the defendant's formidable Sixth Amendment right to retain counsel for his defense."[249] Justice Blackmun argued:

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242. 109 S. Ct. at 2675 (Blackmun, J., dissenting) (quoting 21 U.S.C. § 853(c)).

243. *Id.* at 2675 (Blackmun, J., dissenting); *see also* MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-1, DR 7-101(A) (1974); MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.3 (1983) (describing the duties of searching inquiry and zeal).

244. 109 S. Ct. at 2675 (Blackmun, J., dissenting).

245. *Id.* at 2673-74.

246. *Id.* at 2674.

247. *Id.* at 2675.

248. *Id.* at 2676.

249. *Id.* at 2677.

> In most instances, the assets the Government attempts to reach by using the forfeiture provisions of the Act are derivative proceeds of crime, property that was not itself acquired illegally, but was purchased with the profits of criminal activity. Prior to conviction, sole title to such assets — not merely possession . . . rests in the defendant; no other party has any present legal claim to them.[250]

In the dissenting Justices' view, "the *legitimate* interests the Government asserts are . . . far too weak to justify the Act's substantial erosion of the defendant's Sixth Amendment rights."[251] The dissent saw as the true interest of the Government the weakening of its adversary; "[n]ever before today has the Court suggested that the Government's naked desire to deprive a defendant of 'the best counsel money can buy,' is itself a legitimate government interest that can justify the Government's interference with the defendant's right to chosen counsel . . . ."[252] The nature of the Government's motives is underscored by its interpretation of the provision that allows a third-party transferee of criminally derived assets to retain those assets, so long as he or she had no cause to believe that the property was subject to forfeiture.[253] Most legitimate providers of services will meet the requirements for this statutory exemption. The notable exception is:

> the defendant's attorney, who cannot do his job . . . without asking questions that will reveal the source of the defendant's assets. It is difficult to put great weight on the Government's interest in increasing the amount of property available for forfeiture when the means chosen are so starkly underinclusive, and the burdens fall almost exclusively upon the exercise of a constitutional right. [254]

Justice Blackmun ended his dissent with a call for action by Congress: "[t]hat a majority of this Court has upheld the constitutionality of the Act as so interpreted will not deter Congress, I hope, from amending the Act to make clear that Congress did not intend this result."[255]

The reality of this decision is that it sharply limits the scope of the sixth amendment. While the sixth amendment includes the right to obtain counsel, and to obtain appointed counsel at the Government's expense if necessary, and while it ordains that the counsel must provide

250. *Id.* at 2676.
251. *Id.* (emphasis in original).
252. *Id.* (citations omitted).
253. 21 U.S.C. § 853(c) (Supp. IV 1986).
254. 109 S. Ct. at 2678 (Blackmun, J., dissenting).
255. *Id.*

effective assistance, it does not per se invalidate statutes or governmental actions that make the attainment of effective assistance of counsel difficult or impossible. Effective assistance of counsel is, in essence, the assistance of counsel of the quality that the Government is willing to provide. The practical effects of governmental actions on the provision of counsel will not be examined; so long as counsel is made available, that counsel is presumed to be effectively assisting the defendant, unless the contrary is shown. Thus, in the fee forfeiture or asset-freezing situation, the indirect deprivation of effective assistance of counsel—if that deprivation indeed occurred—was not a constitutional violation. Whether any such constitutional violation could be present in some other form of deprivation has not been determined by the Supreme Court.

V. Sixth Amendment Concerns Applied to Enforcement of the Criminally Derived Property Statute

Several of the concerns expressed by defense attorneys reviewing the fee forfeiture cases[256] will arise when, and if, 18 U.S.C. § 1957 is enforced against attorneys. For example: (1) whether Congress intended for the statute to be applied to an attorney accepting legitimate attorney fees;[257] (2) whether an attorney will be deterred from making full inquiries of his or her client for fear of discovering that his or her fee is derived from criminal sources;[258] (3) whether prosecutors will use the threat of prosecution as a tactic for getting a better settlement from an attorney, or for keeping an attorney from representing a client;[259] (4) whether an attorney will compromise his or her client's position by making a plea bargain with a prosecutor that serves to protect him or herself from prosecution, but harms his or her client;[260] (5) whether the resulting state of affairs rises to the level of a sixth amendment violation warranting a per se rule barring application of the statute to criminal defense attorneys.[261]

The possible effect of this statute on the criminal defense bar is discussed below.

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256. *See* cases discussed *supra* notes 120-255 and accompanying text.

257. *See supra* note 152.

258. *See* De Petris & Bachrach, *supra* note 21, at 4.

259. *Id.*

260. A possible scenario envisioned by De Petris & Bachrach, *supra* note 21; *see also* text accompanying note 175.

261. *See supra* text accompanying notes 177-79.

A. Intent of Congress

Congress had no clear intent regarding attorneys when it passed 18 U.S.C. § 1957.[262] It was cognizant of the danger to attorney-client relations, but in its zeal to pass the bill, Congress omitted the portion of the bill that would have addressed its concerns.[263] The language of the bill, however, is broad enough to encompass attorneys accepting legitimately earned and contracted for legal fees.[264] The 1988 version of the statute addressed attorney fears,[265] but does little to alter the meaning of the statute.[266]

The major distinction between a criminal attorney accepting fees and any other person who does business with a reputed criminal is that the criminal attorney's job is to consort with alleged criminals.[267] No other professional has the duty and obligation to make deals, correspond, and converse with, and then espouse the cause of, criminals or those accused of criminal acts. This makes the likelihood of lawyer transgressions of the statute infinitely greater than that of the ordinary business person. It puts the attorney in the same class as cronies and cohorts of the accused wrongdoer.

It is not yet clear whether this result was the intent of Congress, or whether Congress meant for attorneys implicitly to be excluded from the sweep of the law.[268] If attorneys were meant to be included, as the Justice Department desires,[269] the resultant risks may discourage attorneys from pursuing criminal law.[270]

B. Duty to Make Full Inquiries

An attorney has the duty to make full inquiries of his or her client.[271] Revelations of the client's criminality disclosed in the course of the attorney-client relationship should remain confidential,[272] unless imminent harm will be caused by such concealment.[273]

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262. *See supra* notes 55-58 and accompanying text.

263. *See supra* note 56.

264. For the text of statute, see *supra* note 10.

265. *See supra* text accompanying notes 62-64; *supra* note 64.

266. *See supra* text accompanying notes 62-65.

267. De Petris & Bachrach, *supra* note 21, at 4.

268. For a statement on implicit and explicit exemptions from the statute, see comments of Rep. McCollum, *supra* note 58. See also comments of Senators Kennedy and Dole, *supra* note 65.

269. *See supra* text accompanying note 60.

270. *See* Genego Survey, *supra* notes 1, 6, and 18.

271. *See, e.g.*, MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.1 comment (1987) ("competent handling . . . includes inquiry into factual and legal elements of the problem.").

272. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(B)(1) (1981).

273. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(C)(3) (1981).

If an attorney, in the course of interviewing his or her client, makes a discovery that implicates himself or herself in criminality, he or she has no protection under any ethical code or statute. Yet, such culpability will result under the plain language of section 1957[274] if an attorney is told of the illegal derivation of his or her fees. Nothing in the statute explicitly contradicts this interpretation, although the bow to sixth amendment concerns contained in the 1988 amendments[275] implies such an exception.

The Justice Department assures that it will not prosecute if the source of the attorney's information about his or her fee is privileged communication.[276] This provision in the Draft Guidelines, however, is not statutory and "does not . . . create any rights . . . enforceable at law by any party in any matter, civil or criminal. Nor are any limitations . . . placed on otherwise lawful litigative prerogatives of the Department of Justice."[277] The criminal defense attorney, therefore, has no guarantees that the Justice Department will not prosecute him or her.

It is likely then that the attorney who fears such a discovery might avoid penetrating inquiry to preserve his or her own innocence. If a client is not fully investigated, the attorney's ability to defend him or her will likely be weakened. Yet, under the standards of the courts in *Caplin & Drysdale*[278] and *Evans v. Jeff D.*,[279] such an effect may not rise to the level of ineffective assistance of counsel. Those courts also rejected arguments that the waiver of attorneys' fees would not cause attorneys to violate ethical obligations to fully represent their clients.[280] It may prove more likely that an attorney's effort to preserve his or her own innocence would be seen as a greater inducement to ethical violations, giving rise to the possibility of sixth amendment violations.

C. The Prosecutorial Threat: Compromises in Plea Bargaining

The prosecution's goal is to obtain the maximum sentence while spending the minimum amount of time in court. A prosecutor acts unethically when he or she uses threats against the defense attorney as a means of obtaining a better result in their plea negotiations.[281] However, it is not beyond the realm of possibility that a prosecutor would

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274. *See supra* note 10.

275. *See supra* text accompanying note 63.

276. *See supra* text accompanying notes 105-08.

277. United States Attorneys' Manual, *supra* note 66, § 1-1.100, *reprinted in* 2 THE DEPARTMENT OF JUSTICE MANUAL § 1-1.100 (P-H 1987).

278. 109 S. Ct. 2646, 2654 (1989); *see supra* notes 225-28 and accompanying text.

279. 475 U.S. 717, 728 (1986); *see supra* note 180 and accompanying text.

280. *See* 109 S. Ct. at 2646-47; 475 U.S. at 727-28.

281. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-14 (1980) (duty of a public

attempt to coerce an attorney by threatening him or her with prosecution.[282] It also does not mean that an attorney would not bargain on that basis, despite his or her own ethical code.[283]

D. Availability of Skilled Attorneys

The Government's policy appears to hold suspect any funds paid by a criminal defendant to his or her attorney in a variety of situations that may be connected with innocent behavior.[284] If the funds are found to have been derived from criminal sources, they will be deemed to have belonged to the Federal Government from the time of the crime, and to be forfeitable to the Government upon its demand.[285] If the funds have not yet been transferred to the attorney, they may be held back from him or her until the completion of a trial.[286] If the funds are transferred to the attorney, and he or she has knowledge that they are criminally derived, the attorney could be prosecuted for putting those funds in the bank.[287]

The ultimate effect of placing so many difficulties in the path of a criminal defense may be to deplete the federal criminal bar.[288] Such a depletion could ultimately lead to the unavailability of criminal defense attorneys, especially those skilled enough to defend an accused client in a complex RICO or CCE prosecution. If the states adopt similar tactics in the prosecution of state crimes, many private practitioners in the criminal bar may ultimately be put out of business.

Under the standards set by the Supreme Court in *Monsanto* and *Caplin & Drysdale*, the lack of skilled attorneys would not create a sixth amendment violation per se.[289] However, individual violations of

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prosecutor is to seek justice, not merely to convict).

282. *See* Genego Survey, *supra* note 1 (referring to other forms of governmental harassment, 80% of respondents reported believing that the Justice Department has "intentionally adopted a practice of investigating and prosecuting attorneys who represent defendants in criminal cases as a means of inhibiting and discouraging zealous representation of criminal defendants."); *id.* at 12.

283. See discussion of plea bargaining by attorneys attempting to preserve their fees, *supra* text accompanying notes 176-77; *see also* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-101(A)(3) (1980) ("[a] lawyer shall not intentionally . . . prejudice or damage his client during the course of the professional relationship.").

284. *See supra* note 84.

285. See procedures described in the forfeiture statute, 18 U.S.C. § 1963(c)-(n) (Supp. IV 1986); 21 U.S.C. § 853(c), (e)-¶ (Supp. IV 1986).

286. Note that this has the appearance of a contingency fee, which is specifically barred in criminal matters. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-106(C) (1980).

287. *See supra* note 10 and text accompanying note 11 (Criminally Derived Property Statute).

288. *See supra* notes 1, 6, and 18 (discussion of Genego Survey).

289. *See supra* text accompanying notes 225-30.

the amendment in particular cases could be adjudicated in case-by-case analyses, as required by *Strickland v. Washington*.[290] If the bar is virtually vacant, such analyses would be required in virtually all cases. In such a circumstance, the courts may feel compelled to issue per se rulings that both the forfeiture provisions and the criminally derived funds provisions are per se unconstitutional under the sixth amendment.

VI. CONCLUSION

The Criminally Derived Property Statute affects the attorney-client relationship, but does not cripple it so long as the safeguards in the Justice Department's Draft Guidelines are followed. Since the Draft Guidelines do not create rights or duties, however, the attorney must depend on the good will of the Justice Department to stay within those guidelines.

It is likely that courts will infer from Congress that, in amending the statute in 1988 to mention its concern with sixth amendment guarantees, it meant to incorporate the types of safeguards devised by the Justice Department. Senator Kennedy, in commenting on the 1988 amendments, specifically cites the 1987 Draft Guidelines as providing the kind of protection intended by Congress.[291] If Congress truly intends for the statute to apply only sparingly to attorneys, it ought to make that intention explicit within the statute, and add the Draft Guidelines' protections to the statute. Specifically, Draft Guidelines sections 9-105.430[292] (requiring that attorney's knowledge come from other than privileged communications), 9-105.500[293] (specifying that the Justice Department cannot be an outside source of defendant's information), and 9-105.420[294] (actual knowledge, not willful blindness, required) should be made part of the statute.[295] Without these safe-

290. 466 U.S. 668 (1984); *see also supra* text accompanying notes 190-91.

291. *See supra* note 65.

292. *See supra* notes 105-10 and accompanying text.

293. *See supra* notes 115-16 and accompanying text.

294. *See supra* notes 99-100 and accompanying text.

295. John K. Villa, defense attorney and author of *Banking Crimes*, suggests that language be added to the Guidelines that would prohibit the Government from reviewing or judging the amount of fees without some separate indication of money laundering. Franklin, *supra* note 19, at 6. *See supra* notes 41 (definition of money laundering) and 84 (types of behavior that the Justice Department will accept as indications of criminal activity). Villa also suggests that the language of the Guidelines should provide more details on the initiation of investigations, as well as prohibit deviation from the Guidelines. Franklin, *supra* note 19, at 6.

guards, areas for potential abuse abound, and criminal defendants remain in grave danger of being left with a level of defense far below the minimum that will satisfy the sixth amendment's requirements.

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