GOVERNMENT INTRUSIONS INTO THE ATTORNEY-CLIENT RELATIONSHIP: THE IMPACT OF FEE FORFEITURES ON THE BALANCE OF POWER IN THE ADVERSARY SYSTEM OF CRIMINAL JUSTICE

by
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I. INTRODUCTION

Our criminal justice system is an adversary one, resting upon the premise that both the state and the defendant will advocate their causes with vigorous independence. As a result, "an indispensable element of the effective performance of [defense counsel's] responsibilities is the ability to act independently of the Government and to oppose it in adversary litigation."[1] While partisan advocacy has its limits,[2] the sixth and fourteenth amendments to the United States Constitution[3] guarantee most criminal defendants the right to an attorney[4] who will provide effective legal representation.[5] The Constitution prohibits government conduct which results in actual or constructive denial of the right to counsel, as well as "various kinds of State interference with counsel's assistance."[6] Government attempts to obtain the forfeiture of the fees earned by criminal defense attorneys inevitably interfere with the interests protected by the sixth amendment. To understand how this occurs, it is useful to first explore the dual roles played by defense counsel.

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[1] United States v. Cronic, 466 U.S. 648, 656 n.17 (1984) (quoting Ferri v. Ackerman, 444 U.S. 193, 204 (1979)).

[2] *See, e.g.*, Nix v. Whiteside, 106 S. Ct. 988 (1986)); MODEL CODE OF PROFESSIONAL RESPONSIBILITY (hereinafter MODEL CODE) DR 4-101(C), DR 7-102(B)(1983); MODEL RULES OF PROFESSIONAL CONDUCT (hereinafter MODEL RULES) Rule 1.6(b) (1983).

[3] The sixth amendment provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defence." U.S. CONST. amend. VI.

[4] Gideon v. Wainwright, 372 U.S. 335 (1963); *see also* Scott v. Illinois, 440 U.S. 368 (1979); Argersinger v. Hamlin, 407 U.S. 25 (1972).

[5] *Cronic*, 466 U.S. 648 (1984); Strickland v. Washington, 466 U.S. 688, *reh'g denied*, 467 U.S. 1267 (1984); McMann v. Richardson, 397 U.S. 759 (1970).

[6] *Strickland*, 466 U.S. at 692.

The Supreme Court has defined the sixth amendment right to counsel in language that emphasizes the two essential and interrelated roles that defense attorneys serve in the adversary system of criminal justice. First, the Court has recognized that defense lawyers preserve and promote the interests of individual clients in individual cases, and help to ensure that each defendant receives a fair trial, concluding that "[l]awyers in criminal cases are 'necessities, not luxuries.' Their presence is essential because they are the means through which the other rights of the person on trial are secured."[7] This conclusion embodies the traditional "atomistic" theory of the sixth amendment, which emphasizes the vindication of the rights of individual defendants.

Supreme Court opinions interpreting the right to counsel demonstrate that defense attorneys also play an indispensable institutional role in the criminal justice system. By representing individual clients, and by asserting their clients' constitutional, procedural, evidentiary, and other rights, these attorneys serve fundamental institutional functions essential to the proper operation of the adversary system.[8] This conclusion follows from the Court's recognition that " 'partisan advocacy on both sides of a case will ultimately promote the ultimate objective that the guilty be convicted and the innocent go free.' "[9] The adversary structure of the process dictates that the "accused's right to be represented by counsel is a fundamental component of our criminal justice system."[10] The adversary model incorporating the defendant's right to counsel is ultimately "embodied in the Sixth Amendment."[11]

This "institutional role" theory appears regularly in the case

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[7] *Cronic*, 466 U.S. at 653; *see also* Argersinger v. Hamlin, 407 U.S. 25, 28-29 (1972); Gideon v. Wainwright, 372 U.S. 335, 344-45 (1963); Powell v. Alabama, 287 U.S. 45, 68-69 (1932).

[8] The Supreme Court continues to reaffirm that the "right to the assistance of counsel guaranteed by the sixth and fourteenth amendments is indispensable to the fair administration of our adversarial system of criminal justice." Maine v. Moulton, 106 S. Ct. 477, 483 (1985).

[9] *Cronic*, 466 U.S. at 655 (citation omitted). *See also* Polk County v. Dodson, 454 U.S. 312, 318 (1981)("The system assumes that adversarial testing will ultimately advance the public interest in truth and fairness.").

[10] *Cronic*, 466 U.S. at 653-54.

[11] *Strickland*, 466 U.S. at 685.

law.[12] For example, in construing the meaning of "effective assistance," the Supreme Court stressed that the "Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversary system to produce just results."[13] Although the right to counsel inures to individual defendants, and will be tested in individual cases, surely the Constitution does not permit government conduct which will preclude defense attorneys individually or as a class from satisfying the duties they owe both to clients and to the justice system.

Allowing the government to obtain the forfeiture of defense attorneys' fees would constitute just such unconstitutional conduct, permitting the government to disrupt the "balance of forces between the accused and the accuser"[14] that due process requires, and posing "a serious threat to the adversary process."[15] These results flow inevitably from the structure of the forfeiture statutes and from the impact of fee forfeitures upon three interests protected by the sixth amendment: the right to have an attorney, the right to choose counsel, and the right to effective assistance of counsel. Each of these issues will be explored in the remaining sections of this Article.

II. Fee Forfeitures Under RICO and CCE — Issues of Statutory Analysis

Recent government attempts to obtain the forfeiture of fees earned by attorneys representing defendants in criminal cases are largely the product of 1984 amendments to the Racketeer Influenced and Corrupt Organizations ("RICO")[16] and Continuing

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[12] *See, e.g.*, Nix v. Whiteside, 106 S. Ct. 988 (1986); *Strickland*, 466 U.S. 688; *Cronic*, 466 U.S. 648.

[13] *Strickland*, 466 U.S. at 685-86.

[14] United States v. Reckmeyer, 631 F. Supp. 1191, 1197 (E.D. Va. 1986), *aff'd sub nom.* United States v. Harvey, 814 F.2d 905 (4th Cir. 1987) (quoting Wardius v. Oregon, 412 U.S. 470, 474 (1973)).

[15] United States v. Bassett, 632 F. Supp. 1308, 1317 (D. Md. 1986), *aff'd sub nom.* United States v. Harvey, 814 F.2d 905 (4th Cir. 1987) (quoting United States v. Rogers, 602 F. Supp. 1332, 1350 (D. Colo. 1985)).

[16] 18 U.S.C. §§ 1961-68 (1982).

Criminal Enterprise ("CCE")[17] statutes. Congress originally enacted both statutes in 1970, and each included innovative criminal forfeiture mechanisms. Minimal use of these provisions in the following decade prompted Congress to adopt measures in the 1984 Comprehensive Forfeiture Act ("CFA")[18] which clarified and strengthened the criminal forfeiture provisions of these laws.

The relevant forfeiture provisions are considered *in personam*, or criminal, because they are only imposed as a sanction against individual defendants upon conviction.[19] They differ from the more common *in rem*, or civil, forfeitures, which reach only contraband or the instrumentalities of relevant crimes,[20] and which do not require conviction of the defendant.[21] By enacting the criminal forfeiture statutes, Congress intended to create a powerful weapon in the fight against drug traffickers and "racketeers."[22] The congressional goal was to create a law enforcement mechanism which would make it possible not only to convict criminals, but also to deprive them of the profits of their crimes, and hopefully destroy the economic power bases of their criminal organizations.[23] To accomplish this purpose, Congress enacted the CFA, which revised the criminal forfeiture provisions of the RICO and CCE statutes to include a series of interrelated provisions making forfeiture of a convicted defendant's assets easier to achieve. The following provi-

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[17] 21 U.S.C. § 848 (1982).

[18] Title III of the Comprehensive Crime Control Act of 1984 (CCCA), Pub. L. No. 98-473, 98 Stat. 1837, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS (98 Stat.) 3374.

[19] S. REP. No. 224, 98th Cong., 1st Sess. 13 (1983).

[20] More detailed analyses of criminal and civil forfeitures can be found in Cloud, *Forfeiting Defense Attorneys Fees: Applying an Institutional Role Theory to Define Individual Constitutional Rights*, 1987 WIS. L. REV. 1 (1987); Brickey, *Forfeiture of Attorneys Fees: The Impact of RICO and CCE Forfeitures on the Right to Counsel*, 72 VA. L. REV. 493 (1986); Finkelstein, *The Goring Ox: Some Historical Perspectives on Deodands, Forfeitures, Wrongful Death and the Western Notion of Sovereignty*, 46 TEMP. L. Q. 169 (1973); S. REP. No. 225, 98th Cong., 1st Sess. 194, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS (98 Stat.) 3374.

[21] *See*, S. REP. No. 224, *supra* note 19, at 15 n.12. *See also*, 21 U.S.C. § 881 (1982).

[22] S. REP. No. 225, *supra* note 20, at 194. The scope of the concept of "racketeers" embodied in the RICO statute extends to individuals not conforming to traditional organized crime behavior. It includes, for example, many types of "white collar" criminals. *See* 18 U.S.C. §§ 1961-64.

[23] *See* S. REP. No. 225, *supra* note 20, at 191; H.R. REP. No. 845, 98th Cong., 2d Sess. 1 (1984).

sions of the statutes are of particular significance.

First, the statutes define the property subject to criminal forfeiture broadly, encompassing not only criminal contraband and the instrumentalities of crimes, but also the direct and indirect "proceeds" of the target crimes. The affected proceeds include tangible and intangible property.[24] As a result, prosecutors can pursue forfeiture of assets not directly related to the crimes themselves.

Second, the statutes alter the point in time when the government's interest in forfeitable property arises. Since a finding of guilt provides the theoretical justification for criminal forfeiture of the proceeds of a defendant's criminal activity, it would seem that the government obtains an interest in that property only upon conviction.[25] While logical, this approach limits the power of law enforcers by allowing a criminal to transfer assets to third parties before trial to avoid forfeiture of these assets. The threat of such sham or fraudulent transactions prompted Congress to apply the "relation back" theory, previously limited to civil forfeitures, to criminal forfeitures as well.[26] Under this theory assets become tainted, and thus forfeitable to the government, at the time of the commission of the acts giving rise to the forfeiture. The government's interest relates back to that time. As a result, the government's interest can take priority over the interests of third party transferees to whom the criminal subsequently conveys the asset.[27] The government still does not obtain title to the affected assets at the time of the crimes. The government obtains title only upon conviction of the defendant on the forfeiture counts contained in the indictment.[28]

Third, to prevent suspected criminals from transferring or concealing assets to avoid forfeiture, the statutes empower the government to seek pretrial judicial restraining orders. Restraining orders

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[24] *See* 18 U.S.C. § 1963(a)(3); 21 U.S.C. § 853(a)(3). *Cf.* Russello v. United States, 464 U.S. 16 (1983) (decision consistent with subsequent amendments). *See also* Rogers v. United States, 602 F. Supp. 1332, 1340 (D. Colo. 1985).

[25] *See* 18 U.S.C. § 1963(f) (Supp. III 1986).

[26] 18 U.S.C. § 1963(c) (Supp. III 1986); 21 U.S.C. § 853(c) (Supp. III 1986).

[27] 18 U.S.C. § 1963(c) (Supp. III 1986); 21 U.S.C. § 853(c) (Supp. III 1986).

[28] *See supra* note 25 and accompanying text.

can be granted prior to indictment if the government can persuade a court that such an order is necessary to preserve the suspect's assets.[29]

Finally, the statute requires third parties to wait until a post-conviction hearing to assert their claims opposing forfeiture of assets to the government.[30] At this hearing, the third party petitioner has the burden of proving that he, not the government, is entitled to the property. The petitioner can prevail in only one of two ways: he must prove either that his right, title, or interest vested before the defendant committed the acts giving rise to forfeiture, or show that he was a bona fide purchaser for value, reasonably without cause to believe that the property was subject to forfeiture at the time of transfer.[31] Little disagreement exists about the superior rights of third parties whose interests in property arose prior to the relevant criminal acts. The fee forfeiture debate focuses, instead, upon the meaning and effect of the statutory reference to third parties as bona fide purchasers.

The government claims that this statutory language permits the forfeiture of fees paid or owing to attorneys for legitimate services rendered in defending RICO and CCE clients in the same criminal action in which forfeiture is sought. The Justice Department argues that the statutes contain a "notice theory" which allows the forfeiture of attorneys' fees when the attorney is on notice of certain facts.[32] According to this "notice theory," a criminal defense attorney's fees are subject to criminal forfeiture when he has "actual notice" that: (a) the government has initiated civil forfeiture proceedings, has applied for a pretrial restraining order, or has obtained a grand jury indictment containing a forfeiture count

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[29] *See* 18 U.S.C. § 1963(e) (Supp. III 1986); 21 U.S.C. § 853(e) (Supp. III 1986); United States v. Thier, 801 F.2d 1463 (5th Cir. 1986), *opinion modified on denial of reh'g*, 808 F.2d 249 (5th Cir. 1987).

[30] *See* 18 U.S.C. §§ 1963(j), (m) (Supp. III 1986); 21 U.S.C. §§ 853(k), (n) (Supp. III 1986). *See also* FED. R. CRIM. P. 31(e).

[31] *See* 18 U.S.C. § 1963(m)(6) (Supp. III 1986); 21 U.S.C. § 853(n)(6) (Supp. III 1986).

[32] *See* Dept. of Justice, U.S. Attorney's Manual, §§ 9-111.000-.700, *reprinted in* 38 CRIM. L. REP. 3001-08 (BNA) (Oct. 2, 1985) (hereinafter U.S. Attorneys' Manual) (containing the Justice Department's Guidelines on Forfeiture of Attorneys' Fees).

describing the assets from which the fee is to be paid;[33] or (b) the attorney has actual knowledge that the asset in fact is the proceeds of criminal misconduct.[34]

The practical effect of this notice theory is that defense attorneys, by virtue of their representation of RICO or CCE defendants, are the group most likely to be placed on notice of an asset's forfeitability. This also means that defense attorneys are the third party group most likely to be harmed financially by this statutory interpretation. A defendant's attorney will certainly be aware that the government is seeking civil forfeiture, or has applied for a pretrial order restraining the client's assets, or has obtained an indictment. The first two actions are, of course, entirely within the government's discretion. The third, indictment by a grand jury, is the product of *ex parte* proceedings generally within the prosecutor's control.[35] The notice theory, therefore, allows the government to take unilateral or *ex parte* actions which could result in fees being forfeited.

It requires little imagination to recognize that this theory provides the government with unprecedented leverage over the private defense bar. The government would have the power, for example, to pick and choose the defendants — and the defense attorneys — it wished to place on notice by taking these unilateral or *ex parte* actions. Similarly, if an attorney learns the facts concerning a client's criminal activities, knowledge which is essential to effective representation,[36] the attorney would be placed on notice of his fee's forfeitability. By doing his job properly, counsel would jeopardize his fee. Thus, both prongs of the notice theory put attorneys' fees at risk.

Courts construing the RICO and CCE criminal forfeiture provisions following the 1984 amendments generally have rejected the government's notice theory. A majority of federal courts have ruled

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[33] U.S. Attorneys' Manual, *supra* note 32, §§ 9-111.510-.511.

[34] U.S. Attorneys' Manual, *supra* note 32, §§ 9-111.510, 9-111.512.

[35] *See, e.g., Rogers*, 602 F. Supp. at 1350; *Thier*, 801 F.2d at 1476 (Rubin, J., concurring) ("Indictments are notoriously easy to obtain, and grand juries offer little protection against unwarranted prosecution."). *See also*, Cloud, *supra* note 20, at 45 n.211.

[36] *See infra* notes 50-53 and accompanying text.

that criminal forfeitures only reach assets transferred to third parties in "sham" or "fraudulent" transactions. Since fee payments for legitimate legal services rendered by defense counsel are not "sham" transactions, these fees are not subject to the criminal forfeiture provisions.[37]

The federal courts have relied upon both statutory and constitutional analyses to reach this conclusion. Since most courts have determined that allowing the forfeiture of defense attorneys' fees would violate the sixth amendment,[38] they have searched for a statutory interpretation consistent with the Constitution. In that search these courts have examined the legislative history of the 1984 amendments to the statutes, a record which suggests that Congress intended to prevent suspects and their confederates from structuring "sham" transactions for the purpose of avoiding forfeiture.[39] Relying upon this legislative history, a majority of the

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[37] *See, e.g., Bassett*, 632 F. Supp. at 1316-17; *Reckmeyer*, 631 F. Supp. at 1195-96; United States v. Estevez, 645 F. Supp. 864 (E.D. Wis. 1986); United States v. Figueroa, 645 F. Supp. 453 (W.D. Pa. 1986); United States v. Marx, No. 85-Cr-110 (E.D. Wis. Aug. 6, 1986); United States v. Badalamenti, 614 F. Supp. 194 (S.D.N.Y. 1985); United States v. Ianniello, 644 F. Supp. 452, 455-56 (S.D.N.Y. 1985); United States v. Rogers, 602 F. Supp. 1332 (D. Colo. 1985).

Two recent circuit court opinions have taken different approaches. In United States v. Harvey, 814 F.2d 905 (4th Cir. 1987), the Fourth Circuit recognized that a majority of federal courts have concluded that Congress did not intend to make legitimate defense attorneys' fees subject to forfeiture. The *Harvey* court rejected this statutory interpretation, but held that the sixth amendment prohibits such forfeitures because they would infringe upon the right to choose counsel. *Id.* at 926-27. The *Harvey* court concluded that only "sham" or "fraudulent" fees could be subject to forfeiture.

The decision in United States v. Thier, 801 F.2d 1463 (5th Cir. 1986), *opinion modified on denial of rehearing*, 808 F.2d 249 (5th Cir. 1987), is less clear. The *Thier* court apparently rejected the Justice Department's notice theory and expressed some agreement with five district court opinions disapproving of fee forfeitures. *See id.* at 1474; 808 F.2d at 249. However, the *Thier* court failed to rule directly on the constitutionality of fee forfeitures, and its language is confusing on this issue. *Compare* 801 F.2d at 1474 ("Should the district court refuse to exempt attorney's fees prior to trial and the defendant be convicted, the attorney may demonstrate in a post-conviction hearing that he rendered legitimate services and is entitled to payment from the forfeited assets.") *with* 808 F.2d at 249 ("This is not to say that a defendant's payment of fees to his counsel will always immunize such fees from post-trial forfeiture . . . ."). While a careful reading suggests that the *Thier* court would allow forfeiture only of "sham" fees, the opinion is not explicit on this point.

[38] *See infra* notes 50-53 and accompanying text. *See also, Harvey*, 814 F.2d at 923-27 (discussing this statutory analysis, but disagreeing with it).

[39] *See* S. REP. No. 225, *supra* note 20, at 200-02, 209; H.R. REP. 845, *supra* note 23, at 1,

courts have concluded that Congress did not intend for the criminal forfeiture provisions to extend to legitimate defense attorneys' fees.[40]

III. The Constitutional Implications of Fee Forfeitures

A number of theoretical and practical concerns require that discussion of fee forfeitures not stop with statutory analysis, but that issues arising under the sixth amendment be explored as well. The Justice Department continues to seek the forfeiture of defense attorneys' fees. The RICO and CCE statutes and their legislative histories permit statutory interpretation justifying fee forfeitures.[41] Finally, a future Congress could amend the RICO and CCE statutes to expressly authorize fee forfeitures.[42]

For these reasons it remains necessary to determine whether the sixth amendment permits the forfeiture of fees earned by criminal defense counsel. The following discussion suggests that allowing fee forfeitures would violate the sixth amendment in three ways: first, defendants could be denied any defense counsel; second, defendants' right to effective assistance of counsel inevitably would be impaired; and third, the government would obtain impermissible influence over defendants' choice of counsel. Although each of these results would invade the rights of individual defendants, the greater harm might well be to the ability of defense attorneys — individually and as a class — to perform their institutional tasks.

A. *Complete Denial of Defense Counsel*

At worst, fee forfeitures could deprive RICO and CCE defendants of counsel altogether. Forfeiture of attorneys' fees could make representation financially disastrous for defense counsel in these cases, which often last for years and require thousands of hours of

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19 n.1 (1984); *Rogers*, 602 F. Supp. at 1347.

[40] *See Estevez*, 645 F. Supp. at 872; *Figueroa*, 645 F. Supp. at 456; *Reckmeyer*, 631 F. Supp. at 1195-96; *Ianniello*, 644 F. Supp. at 455-56; *Badalamenti*, 614 F. Supp. at 196; *Rogers*, 602 F. Supp. at 1347-48. *But see Harvey*, 814 F.2d at 923-27.

[41] *Compare* Cloud, *supra* note 20, *with* Brickey, *supra* note 20.

[42] *See* Note, *Attorney Fee Forfeiture*, 86 Col. L. Rev. 1021 (1986).

work.[43] The complexity and length of RICO and CCE prosecutions make the economic risks for defense attorneys unbearable to undertake if fees are forfeitable.[44] The clearest proof of this may be that private sector defense attorneys typically make conditional appearances in these cases[45] so that they may withdraw if the court permits forfeiture of legitimate fees.[46] The economic realities of these cases means that by seeking — or threatening — fee forfeitures, the government can ensure that private counsel will not take these cases.[47] At the same time, if the government does not seek, or does not obtain, a pretrial order restraining his assets, a defendant will still have access to property which could be used to pay fees. This may preclude appointment of counsel at public expense, for arguably the defendant would not satisfy the statutory requirement that he be "financially unable to obtain adequate representation."[48] The end result could be that a defendant would be unable to obtain representation by private or public counsel.[49]

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[43] *See Rogers*, 602 F. Supp. at 1349-50 (complexity of RICO cases may require representation for two or three years); *Badalamenti*, 614 F. Supp. at 196 (RICO and CCE prosecutions are "big" cases in which attorneys are unlikely to risk fee forfeiture); *Ianniello*, 644 F. Supp. at 459.

[44] *Reckmeyer*, 631 F. Supp. at 1197.

[45] *Bassett*, 632 F. Supp. at 1309; *Ianniello*, 644 F. Supp. at 454; *Rogers*, 602 F. Supp. at 1334.

[46] United States v. Thier, No. Cr. 84-60055-23 (W.D. La. Oct. 29, 1985), *rev'd*, 801 F.2d 1463 (5th Cir. 1986).

[47] *See Bassett*, 632 F. Supp. at 1316 (doubtful that attorneys would be willing to make *pro bono* contribution of time necessary for these cases); *Reckmeyer*, 632 F. Supp. at 1197; *Badalamenti*, 614 F. Supp. at 196.

[48] 18 U.S.C. § 3006A(a) (1982 & Supp. III 1986). This is the standard for appointment of counsel under the Criminal Justice Act. *See Badalamenti*, 614 F. Supp. at 197 ("The wealthy [client] cannot claim poverty and apply for appointed counsel. . . . He can get neither a paid lawyer, nor a free one."); *Ianniello*, 644 F. Supp. at 456-57.

[49] *See Badalamenti*, 614 F. Supp. at 196 ("By the Sixth Amendment we guarantee the defendant the right of counsel, but by the forfeiture provisions of the RICO and CCE statute (if they apply to the fee of the defense attorney), we insure that no lawyer will accept the business."); *see also Bassett*, 632 F. Supp. at 1316-17. For a news media account of this problem, see *Lawyers In No Hurry To Take Case Of Alleged Drug Czar*, Atlanta Const., Feb. 12, 1987, at 13, col. 1.

B. *Ineffective Assistance of Counsel*

Even if a defendant can obtain private sector representation, the impact of fee forfeitures could deny defendants the effective assistance of counsel guaranteed by the sixth amendment.[50] The threat of fee forfeiture allows the prosecution to create several inevitable economic and evidentiary conflicts of interest between defendants and privately retained defense counsel.[51] If the assets from which fees are to be paid are subject to forfeiture, the RICO and CCE statutes provide defense counsel with two options upon the client's conviction. The attorney either must foresake his fee or, in an effort to preserve it, testify about his knowledge of the client's activities at a post-conviction hearing. This implicates sixth amendment concerns, putting in conflict the full and open discussion between attorney and client which is essential for effective representation[52] with the specter of the attorney's future testimony which inevitably "chills" attorney-client communications about the facts most relevant to the representation.

This chilling effect may influence both client and attorney communications. The sophisticated client is discouraged from making a full disclosure of facts which might lead to the forfeiture of fees. He may reasonably fear that the government could use these facts to assist it in tracing his assets for enforcement of the forfeiture verdict, or to construct future prosecutions. The client may simply be cautious about disclosing important facts to a potential witness whose testimony will be available to the Justice Department. The client may even hide these facts to encourage his counsel of choice to take the case. The lawyer has correlative incentives not to make a full and effective inquiry about the client's activities. The statutes encourage a defense attorney to avoid learning facts which

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[50] United States v. Cronic, 466 U.S. 648 (1984); Strickland v. Washington, 466 U.S. 668, *reh'g denied*, 467 U.S. 1267 (1984); Holloway v. Arkansas, 435 U.S. 475 (1978); McMann v. Richardson, 397 U.S. 759 (1970); *Reckmeyer*, 631 F. Supp. at 1197.

[51] *See, e.g., Reckmeyer*, 631 F. Supp. at 1197-98; *Badalamenti*, 614 F. Supp. at 196; *Rogers*, 602 F. Supp. at 1349.

[52] Upjohn Co. v. United States, 449 U.S. 383, 389-91 (1981); United States v. Levy, 577 F.2d 200, 209 (3d Cir. 1978); MODEL CODE, *supra* note 2, Canon 4, EC 4-1; MODEL RULES, *supra* note 2, Rule 1.6(a); STANDARDS FOR CRIMINAL JUSTICE, Standard 4-3.2 comment (1984).

might place him on notice of assets' forfeitability because such knowledge could jeopardize his fee.[53]

The forfeiture of fees also would generate conflicts of interest stemming from the economic relationship between defendant and attorney. Since conviction of the defendant is a precondition to asset forfeiture,[54] subjecting legitimate fees to forfeiture would create a contingent fee relationship between attorney and client. The attorney will be paid if the client is acquitted, but not if he is convicted.[55] The ethical rules of the legal profession prohibit contingent fees in criminal cases.[56] As a result, by undertaking representation in the face of a possible fee forfeiture, the attorney is acting unethically, and may be jeopardizing the client's interests as well.

Contingent fees in criminal cases violate public policy because the defense attorney may be deterred from presenting the independent, vigorous defense which the sixth amendment guarantees.[57] The problems created by contingent fees in criminal cases appear strikingly obvious in the fee forfeiture context. The government can place significant pressure upon the attorney-client relationship by offering to exempt fees from forfeiture in exchange for a guilty plea or other concessions affecting client interests. This provides the government with unprecedented and improper leverage over the defense,[58] as well as the power to create conflicts between defendant and attorney. As the preceding examples demonstrate, allowing the forfeiture of legitimate fees produces economic and evidentiary conflicts between defendants and privately retained counsel. These conflicts inevitably interfere with the ability of pri-

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[53] *See Reckmeyer*, 631 F. Supp. at 1197; *Badalamenti*, 614 F. Supp. at 196; *Rogers*, 602 F. Supp. at 1348-49.

[54] 18 U.S.C. § 1963(A)(f) (Supp. III 1986); 21 U.S.C. § 853(a) (Supp. III 1986).

[55] *See Bassett*, 632 F. Supp. at 1316 n.5; *Reckmeyer*, 631 F. Supp. at 1197; *Badalamenti*, 614 F. Supp. at 196-97; *Ianniello*, 644 F. Supp. at 457.

[56] MODEL CODE, *supra* note 2, DR 2-106(C); MODEL RULES, *supra* note 2, Rule 1.5(d)(2).

[57] *See* MODEL CODE, *supra* note 2, DR 5-103(A), EC 5-1, 5-2, 5-7; *Bassett*, 632 F. Supp. at 1316 n.5; *Reckmeyer*, 631 F. Supp. at 1197; *Badalamenti*, 614 F. Supp. at 196-97; *Ianniello*, 644 F. Supp. at 457.

[58] *See, e.g., Estevez*, 645 F. Supp. at 872 ("Defense lawyers should not be made to depend on their adversary to insure their fees are paid.").

vate sector defense attorneys to provide the effective assistance of counsel guaranteed by the sixth amendment.

C. *Government Influence Over Choice of Counsel*

The threat of fee forfeitures also provides the government with impermissible influence over defendants' qualified, but constitutionally protected, right to choose defense counsel.[59] Although the right to choose counsel is not absolute, typically it should not be denied to a defendant with sufficient assets to retain counsel unless this is necessary to satisfy a compelling need to assure the "prompt, effective, and efficient administration of justice."[60] This issue ordinarily arises when a defendant seeks a continuance on the eve of trial for the purpose of retaining new counsel. In that setting, the justice system often has a compelling interest in proceeding to trial, which may outweigh the defendant's right to choose counsel.[61] In contrast, disputes over fee forfeitures do nothing to promote the "prompt, efficient administration of justice." Instead, they generate additional litigation in the form of motions, hearings, and delays involving fee forfeiture issues, and defer resolution of the primary substantive issue: the defendant's guilt or innocence. Thus, fee forfeitures may actually impede the orderly administration of justice.[62]

The current scheme controlling fee forfeitures also infringes upon the sixth amendment right to choose counsel in two other very important ways. First, it allows the government to apply forfeitures selectively in order to exclude specific attorneys — perhaps the best defense counsel — from representing RICO and CCE defendants. This power poses "a serious threat to the adversary

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[59] *See Harvey*, 814 F.2d at 919-924; *Thier*, 801 F.2d at 1471; Urquhart v. Lockhart, 726 F.2d 1316, 1319 (8th Cir. 1984); United States v. Curcio, 694 F.2d 14, 22-23 (2d Cir. 1982); United States v. Cicale, 691 F.2d 95, 106-07 (2d Cir. 1982), *cert. denied*, 460 U.S. 1082 (1983); United States v. LaMonte, 684 F.2d 672, 673 (10th Cir. 1982); Linton v. Perini, 656 F.2d 207, 209 (6th Cir. 1981), *cert. denied*, 454 U.S. 1162 (1982); United States v. Inman, 483 F.2d 738, 739-40 (4th Cir. 1973), *cert. denied*, 416 U.S. 988 (1974).

[60] United States v. Phillips, 699 F.2d 798, 801-02 (6th Cir. 1983); United States v. Burton, 584 F.2d 485, 489 (D.C. Cir. 1978), *cert. denied*, 439 U.S. 1069 (1979).

[61] *See Harvey*, 814 F.2d at 923-24.

[62] *Reckmeyer*, 631 F. Supp. at 1196.

process,"[63] by giving the government the "ultimate tactical advantage of being able to exclude competent defense counsel as it chooses."[64]

Second, the fee forfeiture mechanism may allow the government to prevent many RICO and CCE defendants from retaining private counsel by forcing them to accept an appointed attorney.[65] This raises sixth amendment issues because appointed counsel are unlikely to provide adequate representation for defendants in complex RICO and CCE prosecutions.[66] Federal defender offices generally lack the human and material resources necessary to provide effective representation in lengthy and complicated RICO and CCE cases.[67] Defendants are no better off with private counsel appointed to represent them at government expense. The minimal compensation awarded under the Criminal Justice Act[68] ensures that the most competent attorneys, who command much greater fees, will not undertake representation as appointed counsel in

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[63] *Rogers*, 602 F. Supp. at 1350; *accord Bassett*, 632 F. Supp. at 1317.

[64] *Rogers*, 602 F. Supp. at 1350. *See also Reckmeyer*, 631 F. Supp. at 1197 (Permitting fee forfeitures "would give the government the power to decide whether a defendant will be represented by a particular counsel of his own choice.").

[65] *See Harvey*, 814 F.2d at 924.

> [I]t is hard to see why government might not do directly what unlimited freeze orders and the threat of forfeiture may obviously do indirectly: simply deny persons accused of certain crimes (or all crimes?) the right to employ private counsel to assist them so long as the back-up right to appointed counsel remains. This would . . . obviously be unconstitutional . . . .

[66] *See Thier*, 801 F.2d at 1476 (Rubin, J., concurring) ("No one would wish to be represented by appointed counsel in a case of this nature. . . . The tool of the restraining order . . . gives the Government the power to exclude vigorous and specialized defense counsel."); *Bassett*, 632 F. Supp. at 1317; Rogers, 602 F. Supp. at 1350.

[67] *See Rogers*, 602 F. Supp. at 1349; *see also* Cloud, *supra* note 20, at 48 nn.225-26 for a more complete discussion of this problem.

[68] 18 U.S.C. § 3006A(d) (Supp. III 1985). The Criminal Justice Act ("CJA") establishes ceilings for fees awarded to appointed counsel which fall far below those earned by skilled defense counsel, particularly in complex RICO and CCE cases. Under the CJA standards, compensation shall not exceed $60 per hour for court time and $40 per hour for time "reasonably expended out of court." 18 U.S.C. § 3006A(d)(1) (Supp. III 1985). The CJA limits total compensation in a case to $2,000 for felony prosecutions and $800 for misdemeanors, 18 U.S.C. § 3006A(d)(2) (Supp. III 1985), and permits payments for investigative and expert services up to a maximum $300. 18 U.S.C. § 3006A(e)(1), (3) (1982). The statute permits, but does not require, waiver of these limits in complex cases. 18 U.S.C. § 3006A(d)(3) (1982).

these cases.[69] Thus, by simply appending a forfeiture count to RICO and CCE indictments the Justice Department can exclude the most competent attorneys from these difficult cases. This would alter the balance of power not only between adversaries in individual cases, but also in the RICO and CCE cases as a group, giving the government an ultimate, if unwarranted, tactical advantage.[70]

IV. Resolving the Fee Forfeiture Dilemma

The solution to the sixth amendment problems raised by fee forfeitures is remarkably simple. Legitimate fees earned or contracted for by private defense counsel — and the assets earmarked to pay those fees — need only be exempted from forfeiture. The following discussion demonstrates how this solution protects the valid interests of defendants, their attorneys, and the government.

The impact of attorneys' fee forfeitures is felt prior to conviction, when the defendant or third party retains title to the assets, and while the presumption of innocence still attaches to both defendants and their assets.[71] Allowing fee forfeitures obviously affects defendants' fundamental rights, yet it does not promote any legitimate government interests. Indeed, exempting legitimate defense attorneys' fees from forfeiture accommodates the government's law enforcement interests while protecting the rights of defendants and preserving the institutional roles played by their attorneys. Since only legitimate fees are exempt from forfeiture, the government may still pursue assets when it has evidence that the "fee" is really an artifice designed to avoid forfeiture and preserve the assets for later use by the defendant.[72]

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[69] *See Estevez*, 645 F. Supp. at 871 ("fees above the statutory limit can be paid; realistically, however, the hourly rates paid under the Act are low, and the fee paid under the Act will in all probability not be adequate compensation for the defense."); *Reckmeyer*, 631 F. Supp. at 1197 ("It is further doubtful that any member of the private bar could afford to take on a complex RICO or CCE case under the Criminal Justice Act, since the Act places limits on the amount which can be paid in attorney's fees.") (footnote omitted).

[70] *See Bassett*, 632 F. Supp at 1317; *Reckmeyer*, 631 F. Supp. at 1197-98; *Badalamenti*, 614 F. Supp. at 196; *Rogers*, 602 F. Supp. at 1349-50.

[71] *Thier*, 801 F.2d at 1476 (Rubin, J., concurring); *Bassett*, 632 F. Supp. at 1316.

[72] *See Harvey*, 814 F.2d at 927-28; *Ianniello*, 644 F. Supp. at 458; *Bassett*, 632 F. Supp.

A rule exempting only legitimate fees protects the defendant's sixth amendment interests while promoting the congressional intent of avoiding fraudulent transfers. In fact, exempting fees effectuates Congress' goal of depriving organized crime members of the fruits of their activities more efficiently than does a system allowing fee forfeitures. Payment of fees to defense counsel actually guarantees that a defendant will "lose" the asset. Even if the defendant is acquitted, the asset is conveyed to the attorney. Conversely, a defendant represented by appointed counsel who prevails on the forfeiture counts will retain all title to the assets, even if convicted on some substantive counts.[73] In other words, exempting legitimate defense counsel fees from forfeiture guarantees that the defendant will be deprived of the asset used to pay the fees with more certainty than does the forfeiture mechanism itself.[74]

Methods exist to ensure that a rule exempting fees from forfeiture would not be abused by defendants and unscrupulous attorneys. For example, courts can utilize "set-aside" orders to guarantee that only those assets used for fees are excluded from forfeiture or pretrial restraint. Conversely, courts can permit pretrial restraint of all suspect assets, including those intended for attorneys' fees and therefore exempted from forfeiture. If a defendant is acquitted, the assets would simply be returned to him, and counsel could be paid by the client. If the defendant is convicted and the assets forfeited, the court could distribute legitimate fees to counsel. In the event of a forfeiture conviction, both procedures may allow the courts to review the amount of the fee, and thereby limit the possibility that unscrupulous attorneys might act to shelter assets for their clients.[75]

1317; *Reckmeyer*, 631 F. Supp. at 1195-96; *Badalamenti*, 614 F. Supp. at 198; *Rogers*, 602 F. Supp. at 1346-49. *See also Estevez*, 645 F. Supp. at 872.

[73] *See Thier*, 801 F.2d at 1474-75.

[74] As a result, payment of legitimate attorneys' fees does not "shelter" defendants' ill-gotten assets as the Justice Department contends. *See* UNITED STATES DEPT. OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL, § 9.111.220. It has precisely the opposite effect. This deprivation of assets used to pay attorneys' fees affects innocent and guilty defendants alike.

[75] *See Thier*, 801 F.2d at 1463 (exemption of fees may be consistent with pretrial restraining order of assets used to pay fees in some circumstances); United States v. Marx,

Finally, Congress has closed a potential loophole in the forfeiture statutes previously available to defendants who possess both forfeitable and nonforfeitable assets. Prior to 1986 it was theoretically possible for a defendant to pay defense attorneys' fees from forfeitable assets in order to exempt them from forfeiture, while retaining nonforfeitable assets for the defendant's personal use. The Anti-Drug Abuse Act of 1986 eliminated this problem by adding a "substitution of assets" provision to the RICO and CCE statutes. This permits the government to claim the value of its forfeiture judgment from "clean" assets when, by defendant's own acts or omissions, forfeitable assets have been transferred to, sold to, or deposited with third parties.[76]

It appears that if legitimate defense attorneys' fees are exempted from forfeiture, the government's valid law enforcement interests survive unimpeded. Conversely, whether the "atomistic" or "institutional role" theory is applied, fee forfeitures clearly infringe upon the interests protected by the sixth amendment. If fee forfeitures — or even the threat of their use — deprive defendants of counsel, the sixth amendment is clearly violated.[77] Similarly, if defendants are denied effective assistance of counsel,[78] or their qualified right to choose counsel,[79] they are entitled to relief. The more troubling question is how to determine when that relief should be granted. Supreme Court decisions provide two models for resolving this problem.

One model typically applies in cases where defendants base their

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No. 86-Cr-110 (E.D. Wis. August 6, 1986) (defense attorneys' fees exempt from forfeiture, but pretrial restraining order permissible where defense counsel could file claim for value of services actually rendered if defendant convicted).

[76] The Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, § 1153, *reprinted in* 1986 U.S. CODE CONG. & ADMIN. NEWS, (99 Stat.) 99, (amended 18 U.S.C. § 1963 and § 413 of Title II of the Comprehensive Drug Abuse Prevention and Control Act of 1975). The amendment provides that the "court shall order the forfeiture of any other property of the defendant up to the value of any property" subject to forfeiture but unavailable due to the defendant's specified acts or ommissions. *Id.*

[77] Scott v. Illinois, 440 U.S. 368 (1979); Argersinger v. Hamlin, 407 U.S. 25 (1972); Gideon v. Wainwright, 372 U.S. 335 (1963).

[78] Strickland v. Washington, 466 U.S. 688, *reh'g denied*, 467 U.S. 1267 (1984); United States v. Cronic, 466 U.S. 648 (1984); McMann v. Richardson, 397 U.S. 759 (1970).

[79] *Harvey*, 814 F.2d at 926-27 (citations omitted).

claims for post-conviction relief upon alleged ineffective assistance arising from defense counsel's independent errors of commission or omission during the representation. In such cases, it is appropriate and generally necessary for the judicial system to await the completion of the defendant's trial in order to rule upon these claims. The effect, or even the existence, of counsel's errors generally cannot be measured at earlier stages. If that model is utilized, relief would be granted to RICO and CCE defendants only if they could prove that defense counsel failed to provide effective representation and that counsel's errors affected the trial's outcome.[80] Experience with this approach demonstrates that defendants will prevail only rarely with these claims.

A second model is used in cases where defendants were denied counsel entirely, or were forced to accept representation infected by conflicts of interest which defendants and defense counsel asked the courts to cure, or where defendants were denied counsel of their choice. In those circumstances prejudice may be presumed, and defendants need not prove actual harm to obtain relief.[81] The issues generated by fee forfeitures dictate that this latter approach is appropriate in these cases. If the Justice Department seeks — or threatens — forfeiture of fees, this government action is virtually certain to produce one or more of the following results in every case: the defendant will be denied any public or private counsel, or his right to choose counsel will be infringed upon, or the effectiveness of counsel's representation will be hampered by economic and evidentiary conflicts of interest between the attorney and client. While the first two results most clearly justify a presumption of prejudice, the conflicts affecting the quality of a defense attorney's representation may as well. These conflicts of interest are not the product of the defense attorney's intentional or negligent errors, nor are they produced by voluntary representation of multiple defendants by the attorney.[82] Instead, the conflicts are the inevitable result of the structure of the forfeiture statutes and the govern-

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[80] See *Strickland*, 466 U.S. 668; *Cronic*, 466 U.S. 648.

[81] *Strickland*, 466 U.S. at 692; *Cronic*, 466 U.S. at 658-60; Holloway v. Arkansas, 435 U.S. 475 (1978); *Harvey*, 814 F.2d at 926-27.

[82] Cuyler v. Sullivan, 446 U.S. 335 (1980).

ment's enforcement efforts. These conflicts may have their greatest impact before trial. Post-trial review often will be insufficient, because the conflicts will affect informal, but critical, pretrial activities, like plea bargaining. The Supreme Court has noted that "to assess the impact of a conflict of interest on the attorney's options, tactics, and decisions in plea negotiations would be virtually impossible."[83]

Adopting a presumption of prejudice serves, on the other hand, to ensure that defendants' sixth amendment interests are protected, and that the government will not have the discretionary power to exclude from these cases the attorneys capable of fulfilling the defense counsel's fundamental institutional roles in the adversary system. In this context, defendants should not be forced to prove after conviction that their sixth amendment rights were violated. Rather, prejudice to the interests protected by the sixth amendment — both to the client's rights and to the institutional roles played by defense counsel[84]— should be presumed. Since damage to sixth amendment interests is inherent to the application of the criminal forfeiture system to defense attorney's fees, the only effective remedy is simply to exempt legitimate fees from forfeiture.[85] This approach preserves the government's ability to pursue its valid law enforcement goals. At the same time, it protects both the attorney-client relationship and the balance of power essential to the functioning of the adversary system of criminal justice.[86]

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[83] *Holloway*, 435 U.S. at 491.

[84] *Strickland*, 466 U.S. at 685; *Cronic*, 466 U.S. at 653-55; Gideon v. Wainwright, 372 U.S. 335 (1963); Powell v. Alabama, 287 U.S. 45 (1932).

[85] Federal courts have taken this approach in most of the reported fee forfeiture cases, no matter which sixth amendment interests each court perceived as jeopardized by fee forfeitures. *See, e.g.*, *Harvey*, 814 F.2d at 926-28 (choice of counsel); *Ianniello*, 644 F. Supp. at 456-58 (right to counsel, right to choose counsel, right to effective assistance); *Bassett*, 632 F. Supp. at 1316-17 (right to counsel, right to choose counsel); *Reckmeyer*, 631 F. Supp. at 1196-98 (right to choose counsel, right to effective assistance); *Badalamenti*, 614 F. Supp. at 196-98 (right to counsel, right to effective assistance).

[86] See *Harvey*, 814 F.2d at 927-28, for a discussion of the salutory practical effects of exempting fees from forfeiture:

> Adequate protection of the right to retain private counsel against the mere threat of forfeiture now exists by virtue of our holding that legitimate attorney fees are constitutionally protected from forfeiture. . . .[P]rivate attorneys may undertake

representation, accepting legitimate fees without fear of suffering relation-back forfeiture of these fees. With this decision, there is thus no longer any practical necessity for anticipatory pre-conviction motions by either counsel or defendants seeking exemption of particular property from potential freeze orders or forfeiture. They need only contract for and accept legitimate fees.

Id.