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The Criminal Forfeiture Provisions of the RICO and CCE Statutes: Their Application to Attorneys' Fees

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THE CRIMINAL FORFEITURE PROVISIONS OF THE RICO AND CCE STATUTES: THEIR APPLICATION TO ATTORNEYS' FEES

The Racketeer Influenced and Corrupt Organizations (RICO)[1] and the Continuing Criminal Enterprise (CCE)[2] statutes, enacted in 1970, included with the conventional criminal penalties of fine and imprisonment a new sanction aimed specifically at organized criminal activities[3]—criminal forfeiture.[4] Criminal forfeiture attempts to deter crime by compelling the forfeiture of assets used in connection with or derived from criminal enterprises,[5] in this way taking the profit out of crime.[6] The congres-

1. 18 U.S.C. §§ 1961-1968 (1982 & Supp. II 1984).

2. 21 U.S.C. § 848 (1982 & Supp. II 1984).

3. Conviction under RICO requires that the defendant have engaged in a "pattern of racketeering activity." 18 U.S.C. § 1962 (1982). CCE requires that the defendant have engaged in a "continuing criminal enterprise . . . in concert with five or more other persons." 21 U.S.C. § 848(b) (1982).

4. *See* Comment, *Criminal Forfeiture: Attacking the Economic Dimension of Organized Narcotics Trafficking*, 32 AM. U.L. REV. 227, 229 (1982) (defining criminal forfeiture as "the post-conviction divestiture of the defendant's property or financial interest that has an association with his criminal activities").

5. The criminal penalties provision of RICO provides in part:

> (a) Whoever violates any provision of section 1962 of this chapter shall be fined not more than $25,000 or imprisoned not more than twenty years, or both, and shall forfeit to the United States, irrespective of any provision of State law—
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> (1) any interest the person has acquired or maintained in violation of section 1962;
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> (2) any—
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> (A) interest in;
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> (B) security of;
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> (C) claim against; or
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> (D) property or contractual right of any kind affording a source of influence over;
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> any enterprise which the person has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962; and
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> (3) any property constituting, or derived from, any proceeds which the person obtained, directly or indirectly, from racketeering activity or unlawful debt collection in violation of section 1962.

18 U.S.C. § 1963(a) (Supp. II 1984); *see also* 21 U.S.C. § 853 (Supp. II 1984) (CCE criminal forfeiture provisions).

6. S. REP. No. 617, 91st Cong., 1st Sess. 78-79 (1969) [hereinafter cited as S. REP. No.

sional architects of criminal forfeiture hoped to attack the economic foundations of crime in a way that more traditional penalties had failed to do.[7]

In 1984, largely motivated by perceived weaknesses in the criminal forfeiture statutes,[8] Congress passed the Comprehensive Forfeiture Act,[9] substantially amending the forfeiture provisions of RICO and CCE. The Department of Justice's interpretation of these enhanced forfeiture provisions to permit the seizure of attorneys' fees paid by persons convicted under RICO or CCE has caused a great deal of controversy.[10] In the Depart-

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617]; *see also* S. REP. No. 225, 98th Cong., 2d Sess. 191 [hereinafter cited as S. REP. No. 225], *reprinted in* 1984 U.S. CODE CONG. & AD. NEWS 3182, 3374. S. REP. No. 225, in discussing amendments to the criminal forfeiture provisions, stated:

> Profit is the motivation for [racketeering and drug trafficking], and it is through economic power that it is sustained and grows. More than ten years ago, the Congress recognized in its enactment of statutes specifically addressing organized crime and illegal drugs that the conviction of individual racketeers and drug dealers would be of only limited effectiveness if the economic power bases of criminal organizations or enterprises were left intact, and so included forfeiture authority designed to strip these offenders and organizations of their economic power.

Id.

7. In reporting on the Organized Crime Control Act of 1969, the Senate Judiciary Committee stated:

> Obviously, the time has come for a frontal attack on the subversion of our economic system by organized criminal activities. That attack must begin, however, with the frank recognition that our present laws are inadequate to remove criminal influences from legitimate endeavor organizations. . . .
>
> . . . What is needed here, the committee believes, are new approaches that will deal not only with individuals, but also with the economic base through which those individuals constitute such a serious threat to the economic well-being of the Nation. In short, an attack must be made on their source of economic power itself, and the attack must take place on all available fronts.

S. REP. No. 617, *supra* note 6, at 78-79.

8. In discussing its reasons for amending the criminal forfeiture laws, Congress cited a report by the General Accounting Office (GAO), which found that out of over 5000 drug cases in the period from 1970 through 1980, courts had applied criminal forfeiture in only 98 cases, and the total value of actual and potential forfeiture amounted to only $2 million, less than a heroin trafficker might make in a month. COMPTROLLER GEN. OF THE U.S., ASSET FORFEITURE—A SELDOM USED TOOL IN COMBATTING DRUG TRAFFICKING 10 (1981), *cited in* S. REP. No. 225, *supra* note 6. Further, the GAO reported that criminal forfeiture had failed to attack the economic base of organized crime, finding no significant forfeitures of proceeds of crime or business interest. *Id.* at 11.

The report concluded that this failure could be attributed to two major factors. First, federal law enforcement authorities had not aggressively pursued forfeiture. *Id.* at 16. Second, the forfeiture provisions contained ambiguities that hampered their effectiveness. *Id.* at 30.

9. Pub. L. No. 98-473, tit. II, §§ 301-322, 98 Stat. 1837, 2040-57 (1984) (codified in scattered sections of 18, 19, 21, 26, and 28 U.S.C.).

10. *See* U.S. DEP'T OF JUSTICE, JUSTICE DEPARTMENT GUIDELINES ON FORFEITURE OF ATTORNEYS' FEES (1985) [hereinafter cited as JUSTICE DEPARTMENT GUIDELINES], *reprinted in* 38 CRIM. L. REP. (BNA) 3001 (Oct. 2, 1985). For commentary arguing in favor

ment's view, criminal forfeiture of attorneys' fees finds support in the theory that the money used to pay these fees was derived from or used in a criminal enterprise, and therefore represents forfeitable ill-gotten gains.[11] Since the passage of the 1984 amendments, the courts have disagreed over whether attorneys' fees are subject to forfeiture.[12]

This Note argues that the criminal forfeiture provisions of RICO and CCE should not apply to attorneys' fees legitimately paid for services rendered. Part I examines the distinction between criminal and civil forfeiture, focusing particularly on forfeiture of property transferred to third parties. Part II discusses ways in which forfeiture of attorneys' fees adversely impacts the attorney-client relationship. Part III suggests a construction of the criminal forfeiture provisions that avoids the problems presented by attorneys' fees forfeiture but maintains criminal forfeiture as a deterrent to crime.

I. CIVIL AND CRIMINAL FORFEITURE

RICO and CCE represent a departure from the generally accepted American application of forfeiture. Traditionally, courts have characterized forfeiture as either in rem or in personam.[13]

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of applying criminal forfeiture to attorneys' fees, see Brickey, *Forfeiture of Attorneys' Fees: The Impact of RICO and CCE Forfeitures on the Right to Counsel*, 72 VA. L. REV. 493 (1986); Note, *Forfeiture of Attorneys' Fees Under RICO and CCE*, 54 FORDHAM L. REV. 1171 (1986).

11. Riley, *U.S. Changes Fee Forfeiture Policy*, Nat'l L.J., July 29, 1985, at 32, col. 2 (comments of William Landers, Justice Department Criminal Division special counsel).

12. *Compare* United States v. Bassett, 632 F. Supp. 1308 (D. Md. 1986) *and* United States v. Ianniello, No. S 85 Cr. 115 (S.D.N.Y. Sept. 4, 1985) (available on LEXIS, Genfed library, Dist file) *and* United States v. Badalamenti, 614 F. Supp. 194 (S.D.N.Y. 1985) *and* United States v. Rogers, 602 F. Supp. 1332 (D. Colo. 1985) (holding that attorneys' fees paid by persons convicted under RICO or CCE are not subject to forfeiture) *with* Payden v. United States (*In re* Grand Jury Subpoena Duces Tecum Dated Jan. 2, 1985), 605 F. Supp. 839 (S.D.N.Y.) (suggesting in dicta that RICO and CCE forfeiture does apply to attorneys' fees), *rev'd on other grounds*, 767 F.2d 26 (2d Cir. 1985).

13. Justice Story's opinion in The Palmyra, 25 U.S. (12 Wheat.) 1 (1827), contains the classic enunciation of this distinction:

> It is well known, that at the common law, in many cases of felonies, the party forfeited his goods and chattels to the crown. The forfeiture did not, strictly speaking, attach *in rem;* but it was a part, or at least a consequence, of the judgment of conviction. It is plain from this statement, that no right to the goods and chattels of the felon could be acquired by the crown by the mere commission of the offence; but the right attached only by the conviction of the offender. The necessary result was, that in every case where the crown sought to recover such goods and chattels, it was indispensable to establish its right by producing the record of the judgment of conviction. . . . But this doctrine never

The RICO and CCE statutes are unique in that they authorize in personam forfeiture as a criminal penalty, as opposed to the more common civil application of forfeiture in rem. An important distinction between these two forms of forfeiture is their treatment of transfers to third parties. Despite expressing a desire to use forfeiture as a criminal penalty, Congress, in amending RICO and CCE, used civil forfeiture theory to apply criminal forfeiture to third parties who ordinarily would not be subject to such forfeiture.

A. *The Distinction Between Civil and Criminal Forfeiture*

The American attitude toward criminal forfeiture has traditionally been hostile.[14] Although the courts have accepted civil forfeiture,[15] particularly in the areas of customs and narcotics regulation,[16] no federal law before RICO and CCE applied forfeiture as a criminal penalty.[17] Criminal forfeiture is distinct

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was applied to seizures and forfeitures, created by statute, *in rem*, cognizable on the revenue side of the Exchequer. The thing is here primarily considered as the offender, or rather the offence is attached primarily to the thing; and this, whether the offence be *malum prohibitum*, or *malum in se*.

Id. at 14.

14. The Constitution abolished forfeiture of estate, the common law precursor of criminal forfeiture, as a punishment for treason. U.S. CONST. art. III, § 3, cl. 2 ("The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted."). The First Congress prohibited forfeiture of estate as a criminal punishment with the Act of April 30, 1790, ch. 9, § 24, 1 Stat. 112, 117 (currently codified at 18 U.S.C. § 3563 (1982) (repealed effective Nov. 1, 1987)). The current version provides, "No conviction or judgment shall work corruption of blood or any forfeiture of estate."

The Justice Department took the position that, in enacting criminal forfeiture, RICO repealed 18 U.S.C. § 3563 by implication. *Measures Relating to Organized Crime: Hearings Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary*, 91st Cong., 1st Sess. 407 (1969) [hereinafter cited as *Hearings*] (letter from Deputy Attorney General Richard G. Kleindienst to subcommittee chairman John L. McClellan). But criminal forfeiture under RICO is distinguishable from common law forfeiture of estate. The penalty of forfeiture of estate resulted in forfeiture of all one's property. The scope of criminal forfeiture under RICO and CCE is narrower, requiring forfeiture only of property connected to criminal activities. *See* United States v. Grande, 620 F.2d 1026, 1038-39 (4th Cir.), *cert. denied*, 449 U.S. 830 (1980).

15. *See, e.g.*, Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 683 (1974); Goldsmith-Grant v. United States, 254 U.S. 505, 511 (1921).

16. *See, e.g.*, 21 U.S.C. § 881 (1982 & Supp. II 1984) (Controlled Substances Act forfeiture provision); 19 U.S.C. § 1703 (1982) (forfeiture of vessels used in smuggling); *id.* § 1595a (forfeiture of conveyances used to transport contraband).

17. *Hearings*, *supra* note 14, at 407. *But see* Note, *Bane of American Forfeiture Law—Banished at Last?*, 62 CORNELL L. REV. 768, 779 n.73 (1977) (contending that the Justice Department's assertion that RICO was the first instance of federal criminal forfeiture overlooks an important federal case holding that forfeiture under a federal em-

from civil forfeiture both in the means with which it seeks to achieve its objectives and in those objectives themselves. In addition, the in rem/in personam distinction affects the extent to which the government can seize property transferred to third parties. RICO and CCE extend criminal forfeiture beyond traditionally accepted limits on the application of forfeiture to third parties.[18]

The most important difference in means between civil and criminal forfeiture is that civil forfeiture proceeds in rem, acting against the property, while criminal forfeiture acts in personam directly against the convicted defendant.[19] In rem forfeiture is grounded in the legal fiction that the property itself is guilty of wrongdoing.[20] Under this personification fiction, courts have long held that forfeiture takes effect at the moment property is used in connection with a crime and that the government's title vests at that time.[21] This "relation back doctrine" voids all transfers made subsequent to the crime[22] and allows the government to take possession of property transferred to parties who themselves have had no involvement with the criminal activity.[23]

Property subject to forfeiture is at least the nominal subject of the in rem forfeiture action.[24] Guilt or innocence of the individ-

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bargo statute was to be imposed as part of a criminal action, *see* United States v. Mann, 26 F. Cas. 1153, 1155 (C.C.D.N.H. 1812)).

18. United States v. Rubin, 559 F.2d 975, 991 (5th Cir. 1977) (Noting the unusual use of forfeiture as a criminal penalty, the court stated, "Such a penal foray bespeaks a need for circumspection."), *vacated on other grounds*, 439 U.S. 810 (1978).

19. The Palmyra, 25 U.S. (12 Wheat.) 1, 13-14 (1827).

20. Comment, *supra* note 4, at 232-33; Note, *supra* note 17, at 784.

21. United States v. Stowell, 133 U.S. 1, 16-17 (1890).

22. *See* United States v. United States Coin & Currency, 401 U.S. 715, 719-20 (1971); United States v. Stowell, 133 U.S. 1, 16-17 (1890). Though courts have read relation back into in rem forfeiture statutes, some civil forfeiture statutes provide for this explicitly. *See, e.g.*, 21 U.S.C. § 881(h) (Supp. II 1984) ("All right, title, and interest in property described in subsection (a) of this section shall vest in the United States upon commission of the act giving rise to forfeiture . . . .").

23. Such an application of forfeiture leads to admittedly harsh results at times. *See* Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 685-90 (1974), and cases cited therein.

Remission, in cases where forfeiture seems unduly harsh, was available under common law, *see id.* at 689 n.27. In other instances, a statute may provide some relief. *See, e.g.*, 19 U.S.C. § 1618 (Supp. II 1984) (providing for remission of forfeiture under the navigation and customs laws when a court finds that "forfeiture was incurred without willful negligence or without any intention on the part of the petitioner to defraud the revenue or to violate the law, or finds the existence of such mitigating circumstances as to justify . . . remission").

24. Often the property itself is named as a "party" in the civil forfeiture action. *See, e.g.*, United States v. One 1977 Pontiac Grand Prix, 483 F. Supp. 48 (N.D. Ill. 1979); United States v. One Mannlicher-Carcano Military Rifle, 250 F. Supp. 410 (N.D. Tex. 1966).

ual possessing the property in question is not an issue in a civil forfeiture action, and courts have routinely rejected the claimed innocence of the possessor as a defense to in rem forfeiture.[25] Courts have similarly rejected the argument that civil forfeiture constitutes a deprivation of property without due process of law,[26] reasoning that the owner's rights are not before the court in a civil forfeiture action.[27]

Criminal forfeiture takes a very different approach. Unlike the civil forfeiture statute, which provides for the forfeiture of property used in the commission of a crime, the RICO and CCE statutes direct their sanctions against individuals who have violated their provisions.[28] As a criminal penalty, forfeiture under RICO and CCE should only take effect after there has been a criminal conviction.[29] RICO and CCE involve criminal rather than civil forfeiture, so the innocence of the defendant is very much an issue.[30]

Because criminal forfeiture is contingent upon a finding of personal guilt, under traditional in personam forfeiture theory, relation back cannot divest the property rights of innocent third party transferees.[31] To the extent RICO and CCE involve crimi-

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25. Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 683 (1974); United States v. Brig Malek Adhel, 43 U.S. (2 How.) 210, 238 (1844); The Palmyra, 25 U.S. (12 Wheat.) 1, 14 (1827).

26. *See* Van Oster v. Kansas, 272 U.S. 465, 468 (1926) (holding that a state forfeiture statute depriving an innocent owner of property as a consequence of illegal acts committed by one entrusted with property does not violate due process under the fourteenth amendment); Goldsmith-Grant Co. v. United States, 254 U.S. 505, 511 (1921) (holding that forfeiture of a car used in violation of federal law was not unconstitutional even though the owner had no knowledge of its illegal use).

27. Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 683 (1974); Goldsmith-Grant Co. v. United States, 254 U.S. 505, 511 (1921); United States v. Brig Malek Adhel, 43 U.S. (2 How.) 210, 238 (1844); The Palmyra, 25 U.S. (12 Wheat.) 1, 14 (1827).

28. Compare RICO, which applies its penalties to "[whomever] violates any provision," 18 U.S.C. § 1963(a) (Supp. II 1984) with the language of a typical civil forfeiture statute, which provides that "[t]he following shall be subject to forfeiture to the United States and no property right shall exist in them." 21 U.S.C. § 881(a) (1982 & Supp. II 1984) (forfeiture provision of the Controlled Substances Act).

29. United States v. Ambrosio, 575 F. Supp. 546, 550 (E.D.N.Y. 1983) ("Before a person's interest in an enterprise can be declared forfeited under RICO, that person must be convicted of an offense prohibited by RICO."); *see also* United States v. Thevis, 474 F. Supp. 134, 145 (N.D. Ga. 1979), *aff'd*, 665 F.2d 616 (5th Cir.), *cert denied*, 459 U.S. 825 (1982); Comment, *RICO Forfeitures and the Rights of Innocent Third Parties*, 18 CAL. W.L. REV. 345, 350-51 (1982).

30. United States v. Veon, 538 F. Supp. 237, 242 (E.D. Cal. 1982).

31. Tarlow, *RICO: The New Darling of the Prosecutor's Nursery*, 49 FORDHAM L. REV. 165, 285 (1980):

> This "relation back" principle is inapplicable to RICO *in personam* forfeitures because the doctrine is grounded in the essential nature of *in rem* forfeiture actions. In those actions, the innocence of the owner is irrelevant because the

nal proceedings and third parties are not even before the court, the court is unable to adjudicate the rights of these parties.[32] Even if third parties were before the court, their lack of involvement in any crime should act as an absolute defense to any criminal penalty. To penalize criminally those who have committed no crime exposes in personam forfeiture to due process attack of the kind rejected in connection with in rem forfeiture.[33]

The two forms of forfeiture also differ in their objectives. Courts commonly view civil forfeiture as a remedial measure[34] and criminal forfeiture as punitive in nature.[35] Typically, civil forfeiture applies to instrumentalities of crime, such as illicit drugs[36] or weapons,[37] which are inherently harmful. In this way, courts have characterized civil forfeiture as an exercise of the state's police powers.[38] The kinds of property forfeitable under the civil statutes, by their very nature, justify the extension of civil forfeiture to third party transferees as a means of removing

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thing to be forfeited is considered the offender. Thus, the "relation back" doctrine cannot be employed in an *in personam* action in which forfeiture is dependent on the guilt of the former owner. Accordingly, because RICO established an *in personam* forfeiture procedure, the innocence of the present owner must control if the defendant does not retain an interest in the property.

(footnotes omitted).

32. United States v. Thevis, 474 F. Supp. 134, 145 (N.D. Ga. 1979) ("Mandatory forfeiture under 18 U.S.C. § 1963(a) follows conviction of the activities set forth in § 1962 . . . . To the extent that those 'heirs, successors, and assigns' are not before the Court, there can be no forfeiture under 18 U.S.C. § 1963 since there can be no conviction under § 1962.") (citation omitted), *aff'd*, 665 F.2d 616 (5th Cir.), *cert. denied*, 459 U.S. 825 (1982).

33. *See supra* notes 25-27 and accompanying text.

34. *See* United States v. One Assortment of 89 Firearms, 465 U.S. 354, 361 (1984); One Lot Emerald Cut Stones & One Ring v. United States, 409 U.S. 232, 237 (1972).

35. *See* United States v. Long, 654 F.2d 911, 914 (3d Cir. 1981) ("[RICO forfeiture] provisions operate as an additional penalty against the defendant . . . ."); *see also* United States v. Veon, 538 F. Supp. 237, 242 (E.D. Cal. 1982).

But the Supreme Court has indicated dissatisfaction with this remedial/punitive distinction. *See* United States v. United States Coin & Currency, 401 U.S. 715, 721-22 (1971) ("When the forfeiture statutes are viewed in their entirety, it is manifest that they are intended to impose a penalty only upon those who are significantly involved in a criminal enterprise.") (footnote omitted); *see also* Boyd v. United States, 116 U.S. 616, 634 (1886). For a criticism of the remedial/punitive distinction, see Clark, *Civil and Criminal Penalties and Forfeitures: A Framework for Constitutional Analysis*, 60 MINN. L. REV. 379, 475-81 (1976).

36. *See, e.g.*, 21 U.S.C. § 881(a)(1) (1982 & Supp. II 1984) (subjecting all controlled substances used in violation of the law to forfeiture).

37. *See, e.g.*, 18 U.S.C. § 924(d) (1982) (subjecting any firearm or ammunition used in violation of any criminal law to forfeiture).

38. United States v. Jenison, 484 F. Supp. 747, 753 (D.R.I. 1980) ("[F]orfeitures are not punishment for criminal activity, but rather an exercise of the police power of the state to confiscate property that was instrumental in a crime so as to prevent the continuance of unlawful acts."); *see also* United States v. One 1967 Ford Mustang, 457 F.2d 931, 932 (9th Cir.), *cert. denied*, 409 U.S. 850 (1972).

such dangerous instrumentalities from public circulation and preventing their use in future crimes.[39]

No such justification exists, however, for applying criminal forfeiture to third parties. The object of forfeiture under RICO and CCE is to punish those found guilty of violating their provisions, thus acting as an added deterrent to crime.[40] To force third parties, who themselves have not violated any law, to forfeit property transferred to them by people who have committed a crime does not further the aim of deterrence.

B. The RICO and CCE Amendments

In 1984, Congress amended RICO and CCE to address the problem of defendants' transfer of property prior to conviction in order to avoid forfeiture.[41] The result, the Comprehensive Forfeiture Act of 1984,[42] explicitly incorporated relation back as part of criminal forfeiture.[43] Congress disclaimed any desire to broaden the substantive reach of criminal forfeiture, stating that its intention in amending RICO and CCE was only to clarify ambiguities in the forfeiture provisions.[44] The practical effect of this amalgamation of criminal and civil forfeiture, however, was to extend criminal forfeiture to third parties not previously subject to such forfeiture.

In enacting RICO and CCE, Congress acknowledged the distinction between civil and criminal forfeiture[45] and also recog-

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39. This justification becomes more tenuous, however, when extended to "derivative contraband," which is forfeitable only because of its illegal use. An example of derivative contraband would be a vehicle used in transporting narcotics. *See generally* Smith, *Modern Forfeiture Law and Policy: A Proposal for Reform*, 19 WM. & MARY L. REV. 661 (1978).

40. United States v. Long, 654 F.2d 911, 914 (3d Cir. 1981); United States v. Veon, 538 F. Supp. 237, 242 (E.D. Cal. 1982).

41. S. REP. No. 225, *supra* note 6, at 196, *reprinted in* 1984 U.S. CODE CONG. & AD. NEWS at 3379.

42. Pub. L. No. 98-473, tit. II, §§ 301-322, 98 Stat. 1837, 2040-57.

43. The criminal forfeiture provisions as amended provide:

> All right, title, and interest in 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 . . . .

18 U.S.C. § 1963(c) (Supp. II 1984); *see also* 21 U.S.C. § 853(c) (Supp. II 1984) (criminal forfeiture provisions of CCE).

44. S. REP. No. 225, *supra* note 6, at 192, *reprinted in* 1984 U.S. CODE CONG. & AD. NEWS at 3375.

45. *Id.* at 193, *reprinted in* 1984 U.S. CODE CONG. & AD. NEWS at 3376.

nized that the government's power to follow assets into the hands of third parties is not unlimited in a criminal action.[46] Congress limited the reach of criminal forfeiture by providing that a transferee can avoid forfeiture if he can establish that he was a "bona fide purchaser . . . who at the time of purchase was reasonably without cause to believe that the property was subject to forfeiture."[47] But even with this provision, the amended RICO and CCE statutes are inconsistent in their use of forfeiture as a criminal penalty. First, as amended, RICO and CCE apply forfeiture to persons who have not violated their substantive provisions. Second, the amendments require persons seeking to avoid the imposition of the criminal penalty to prove their innocence rather than requiring the government to prove their guilt.

The language exempting the bona fide purchaser from forfeiture provides no protection to the attorney representing a client charged under RICO and CCE. To the extent that money used to pay the lawyer is connected to activity forbidden by RICO or CCE, that money is subject to forfeiture under the relation back provisions,[48] unless the lawyer can prove that he was reasonably without cause to believe the money was subject to forfeiture. Though the amendments do not explicitly address the question of forfeitability of attorneys' fees, preamendment cases have held that knowledge of the contents of the indictment is sufficient to put the attorney on notice of the government's claim to forfeiture.[49] Whether or not the attorney is held to notice of forfeiture, it seems highly unlikely that the lawyer whose client is charged under RICO or CCE will be able to meet the standard set by the statutes.[50] Adequate representation requires full

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46. *Id.* at 208, *reprinted in* 1984 U.S. CODE CONG. & AD. NEWS at 3391.

47. 18 U.S.C. § 1963(c) (Supp. II 1984); 21 U.S.C. § 853(c) (Supp. II 1984).

48. United States v. Badalamenti, 614 F. Supp. 194, 196 (S.D.N.Y. 1985) ("[A] literal reading of [RICO and CCE] would seem to encompass the legal fee.").

49. United States v. Raimondo, 721 F.2d 476, 478 (4th Cir. 1983), *cert. denied*, 469 U.S. 837 (1984); United States v. Long, 654 F.2d 911, 917 (3d Cir. 1981).

Interpreting RICO's "reasonably without cause" language, the court in United States v. Rogers, 602 F. Supp. 1332, 1347 (D. Colo. 1985) stated that, in amending the RICO provisions, Congress must be presumed to have been aware of existing case law and that the amended statutes must be read in light of that case law.

50. *See* United States v. Badalamenti, 614 F. Supp. 194, 196 (S.D.N.Y. 1985) ("No one is more on notice of likelihood that the money may come from such prohibited activity than the lawyer who is asked to represent the defendant in the trial of the indictment."); *see also* United States v. Raimondo, 721 F.2d 476 (4th Cir. 1983) ("[D]efense counsel . . . could not have been unaware of the possibility that the property conveyed to his law firm in return for legal services may have represented the profits of . . . [a] continuing criminal enterprise."), *cert. denied*, 469 U.S. 837 (1984).

knowledge about the client's case,[51] which, in a RICO or CCE case, would necessarily include knowledge about the client's assets. Further, to require the lawyer to divulge knowledge about his client's assets would require the disclosure of information that is at least arguably privileged.[52]

Congress did not intend to eliminate the distinction between civil and criminal forfeiture. The legislative history of RICO and CCE indicates that this distinction was an important factor motivating Congress to amend the statutes.[53] Both with the original forfeiture statutes and the 1984 amendments, Congress expressed a desire to create new *criminal* penalties that might effectively address the profit motive of narcotics selling and other organized criminal activities.[54] Rather than rely on existing in rem forfeiture statutes,[55] Congress chose instead in personam forfeiture, seeing special advantages in a penalty aimed directly at specific individuals.[56] With criminal forfeiture, Congress believed it was creating a completely new mechanism for dealing with the problem of organized crime.[57] The practical impact of the amendments has been to blur the distinction between civil and criminal forfeiture and to apply a criminal penalty against individuals who have committed no crime.

II. THE IMPACT OF CRIMINAL FORFEITURE ON THE ADVERSARY SYSTEM

Besides general due process concerns about application of

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51. AMERICAN BAR ASSOC., STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE § 3.2, at 122 (1974) (project on standards for Criminal Justice):

> (a) As soon as practicable the lawyer should seek to determine all relevant facts known to the accused. In so doing, the lawyer should probe for all legally relevant information without seeking to influence the direction of the client's responses.
>
> (b) It is unprofessional conduct for the lawyer to instruct the client or to intimate to him in any way that he should not be candid in revealing facts so as to afford the lawyer free rein to take action which would be precluded by the lawyer's knowing of such facts.

52. *See infra* notes 81-85 and accompanying text.

53. S. REP. No. 225, *supra* note 6, at 193, 196-97, *reprinted in* 1984 U.S. CODE CONG. & AD. NEWS at 3376, 3379-80 (comparing civil and criminal forfeiture).

54. *Id.* at 191, *reprinted in* 1984 U.S. CODE CONG. & AD. NEWS at 3374; *see also* 116 CONG. REC. 35,193 (1970) (remarks of Rep. Poff).

55. S. REP. No. 617, *supra* note 6, at 79-80 (1969); S. REP. No. 225, *supra* note 6, at 193, *reprinted in* 1984 U.S. CODE CONG. & AD. NEWS at 3376.

56. *See* S. REP. No. 225, *supra* note 6, at 193, *reprinted in* 1984 U.S. CODE CONG. & AD. NEWS at 3376.

57. S. REP. No. 617, *supra* note 6, at 79-80.

criminal penalties to innocent third parties, RICO and CCE present special problems when the third party is a lawyer and the property to be forfeited has been transferred as payment for legal services rendered in a RICO or CCE defense. The adversary system depends on the fair and equal representation of opposing parties. Application of forfeiture to attorneys' fees distorts the adversary system in favor of the prosecution in three ways: forfeiture infringes the defendant's constitutionally guaranteed right to counsel, undermines the attorney-client relationship, and opens the door to prosecutorial abuse.

A. Right to Counsel

The application of criminal forfeiture to attorneys' fees may make it impossible for the RICO or CCE defendant to get legal representation. Where the court enters a restraining order[58] preventing the defendant from transferring assets, the court will also appoint counsel for the defendant who is unable to pay for a lawyer.[59] If, however, the court enters no restraining order and the defendant retains the use of his assets until his conviction, he faces a dilemma. The defendant, having ample funds available to retain counsel, cannot qualify as indigent, but may be unable to find a lawyer who, knowing that his fees will be subject to forfeiture if his client is convicted, will take the case.[60]

To the extent that a lawyer will be unwilling to take on a RICO or CCE case, forfeiture will prevent the defendant from retaining the counsel of his choice. The defendant's right to counsel of choice, although not absolute, is an essential element of the protections of the sixth amendment.[61] One accepted limitation on the defendant's right to retain counsel of his choice is that he have the necessary financial means.[62] The indigent defendant, though he has a right to counsel, is limited in deciding

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58. 18 U.S.C. § 1963(e)(1) (Supp. II 1984) provides in part, "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) for forfeiture under this section . . . ." *See also* 21 U.S.C. § 853(e) (Supp. II 1984) (CCE forfeiture provisions).

59. Johnson v. Zerbst, 304 U.S. 458, 463 (1938).

60. United States v. Badalamenti, 614 F. Supp. 194, 196 (S.D.N.Y. 1985).

61. Crooker v. California, 357 U.S. 433, 439 (1958); Powell v. Alabama, 287 U.S. 45, 53 (1932).

62. Urquhart v. Lockhart, 726 F.2d 1316, 1319 (8th Cir. 1984); United States v. Inman, 483 F.2d 738, 739 (4th Cir. 1973).

who that counsel will be.[63] Some courts have compared the RICO defendant to the indigent and have rejected the defendant's right to counsel of choice in RICO and CCE cases.[64] One court has reasoned that because rights to the defendant's assets are not resolved until after the conclusion of the criminal proceeding, a court is unable to determine with any certainty that the assets belong to the defendant.[65] Therefore, because the right of an indigent to choose his own counsel is a qualified one, prohibiting the transfer of assets does not infringe upon the defendant's rights. This argument fails to recognize, however, that until the defendant has been convicted, the government has not established that the assets *do not* belong to the defendant. The argument also overlooks the fact that RICO and CCE are distinctly criminal statutes and that forfeiture operates upon a finding of personal guilt.[66]

A second qualification on the right to choose one's own counsel is judicial economy.[67] Typically, courts deny the defendant's right to counsel of choice because that choice would disrupt the orderly administration of justice.[68] Because the application of forfeiture to attorneys' fees will actually result in greater delay, the judicial economy rationale does not justify infringement of the right to counsel of choice. By making it more difficult for the defendant to find an attorney, forfeiture increases the time

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63. United States v. Hampton, 457 F.2d 299, 301 (7th Cir.) ("It is well established law that an indigent does not have the absolute right to a counsel of his own choosing.") (citation omitted), *cert. denied*, 409 U.S. 856 (1972); United States v. White, 451 F.2d 1225, 1226 (6th Cir. 1971) (per curiam) (noting that the Criminal Justice Plan for the Sixth Circuit provides that the defendant "shall not be permitted to make the selection of any attorney to represent him"); *see also* United States v. Davis, 604 F.2d 474, 478-79 (7th Cir. 1979) (listing a number of plans that have been adopted by the federal courts pursuant to the Criminal Justice Act that specifically preclude the defendant from making the choice of the lawyer who will represent him).

64. United States v. Bello, 470 F. Supp. 723, 725 (S.D. Cal. 1979) (holding that a restraining order preventing the defendant from transferring assets does not deprive him of counsel, but only of counsel of his own choice).

65. Payden v. United States (*In re* Grand Jury Subpoena Duces Tecum Dated Jan. 2, 1985), 605 F. Supp. 839, 849 n.14 (S.D.N.Y.), *rev'd on other grounds*, 767 F.2d 26 (2d Cir. 1985).

66. *See supra* notes 28-33 and accompanying text.

67. United States v. Rogers, 602 F. Supp. 1332, 1348 (D. Colo. 1985); United States v. Burton, 584 F.2d 485, 489 (D.C. Cir. 1978), *cert. denied*, 439 U.S. 1069 (1979).

68. United States v. Burton, 584 F.2d 485, 489 (D.C. Cir. 1978) ("The right [to retain counsel of one's own choice] 'cannot be insisted upon in a manner that will obstruct an orderly procedure in courts of justice, and deprive such courts of the exercise of their inherent powers to control the same.' ") (quoting Smith v. United States, 288 F. 259, 261 (D.C. Cir. 1923)), *cert. denied*, 439 U.S. 1069 (1979); *see also* United States v. Inman, 483 F.2d 738, 740 (4th Cir. 1973) (holding that denial of continuance, requested so that defendant could be represented by counsel of his choice, was not abuse of discretion).

before a case can come to trial. If the defendant has an ongoing relationship with an attorney,[69] and if that attorney will not defend the client in the criminal action because of the threat of forfeiture, the defendant must find a replacement and this wastes time. The new attorney will need more time to prepare the defense.

The nature of RICO and CCE litigation makes the right to retain counsel of one's choice more critical in these than in many other kinds of cases. RICO and CCE cases are generally complex, involving grand jury proceedings and protracted litigation.[70] To place the primary responsibility for these cases with court-appointed counsel risks exhausting the resources of an already greatly overburdened public defender system.[71] One court has suggested that a court-appointed counsel may be unable to mount an adequate RICO defense.[72]

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69. For example, defense counsel in United States v. Rogers, 602 F. Supp. 1332 (D. Colo. 1985), had previously represented the defendant in two cases brought by the government. Defendant Gerald Leo Rogers' Memorandum Brief in Support of (1) His Objection to Plaintiff's Petition for an Order Restraining a Transfer or Other Disposition of Property or Other Financial Interests in Certain Financial Enterprises; and (2) His Motion for an Order Excluding Attorneys' Fees and Costs at 27, *id.*

70. *See* United States v. Rogers, 602 F. Supp. 1332, 1349 (D. Colo. 1985).

71. *See generally* N. LEFSTEIN, CRIMINAL DEFENSE SERVICES FOR THE POOR (1982). In surveying various public defender systems around the country, Professor Lefstein concluded:

> The decision to furnish counsel to the accused in criminal and juvenile cases is a matter of federal constitutional right, not simply of grace. Yet, as documented in this report, meaningful compliance with the Constitution is often absent due to inadequate funding. Indeed, public defender and assigned counsel programs experience virtually every imaginable kind of financial deficiency. There are neither enough lawyers to represent the poor, nor are all the available attorneys trained, supervised, assisted by ample support staffs, or sufficiently compensated.

Id. at 56 (citation omitted); *see also* AMERICAN BAR ASSOC., GIDEON UNDONE: THE CRISIS IN INDIGENT DEFENSE SPENDING (1982) (transcript of a hearing, during the annual conference of the National Legal Aid and Defender Association, on the crisis in indigent funding); *The Criminal Defense Crisis*, Nat'l L.J., Apr. 26, 1982, at 1, col. 1; *Indigent Defense in Crisis*, Nat'l L.J., Sept. 26, 1983, at 1, col. 1.

72. United States v. Rogers, 602 F. Supp. 1332, 1349 (D. Colo. 1985); *see also* United States v. Decoster, 624 F.2d 196, 264 n.3 (D.C. Cir. 1979) (en banc) (Bazelon, J., dissenting):

> There is no dearth of competent counsel for the rich in our society. But no one can say that the same is true for the indigent. The inadequate representation received by the poor is universally recognized . . . . And although the commitment and competence of court-appointed counsel has improved markedly over recent years, particularly with the development of public defender systems, its effectiveness is still handicapped by unmanageable caseloads, insufficient support services, inexperience in criminal trial practice, lack of independence from the judiciary that controls the appointments and fixes compensation, and inadequate levels of funding and fee schedules.

See also Bazelon, *The Realities of* Gideon *and* Argersinger, 64 GEO. L.J. 811 (1976);

B. *Attorney-Client Relationship*

The sixth amendment guarantees more than the right to representation by a lawyer at trial.[73] The defendant is constitutionally entitled to *effective* assistance of counsel.[74] The development and maintenance of a trust relationship between lawyer and client is essential to effective representation.[75] The application of forfeiture to attorneys' fees chills the attorney-client relationship in two respects. First, the prospect of forfeiture of fees presents the lawyer with a serious conflict of interest. Second, forfeiture inhibits the free flow of information between the client and his attorney.

To subject attorneys' fees to possible criminal forfeiture creates a contingent fee arrangement.[76] The lawyer who successfully defends his client will be paid while the lawyer whose client is convicted will lose his fee. Such a possibility may tempt the lawyer to compromise his client's interest and negotiate a guilty plea that does not involve forfeiture.[77] To avoid such potential conflicts, the canons of legal ethics strictly prohibit contingent

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Berger, *The Supreme Court and Defense Counsel: Old Roads, New Paths—A Dead End?*, 86 COLUM. L. REV. 9 (1986).

73. Gandy v. Alabama, 569 F.2d 1318, 1321 (5th Cir. 1978) ("[J]udicial refinement of the right to counsel concept suggested that the mere representation by counsel, *per se*, would not always satisfy minimal due process standards.") (citation omitted); *see, e.g.*, Geders v. United States, 425 U.S. 80, 91 (1976) (holding that an order preventing defendant "from consulting his counsel 'about anything' during a 17-hour overnight recess between his direct- and cross-examination impinged upon his right to the assistance of counsel"); Anders v. California, 386 U.S. 738, 744-45 (1967) (holding that an attorney must prosecute appeal of an indigent client with the same degree of zeal that he would that of a paying client); Glasser v. United States, 315 U.S. 60, 76 (1942) (holding that the appointment of his attorney to represent a co-defendant violated the defendant's right to assistance of counsel); Javor v. United States, 724 F.2d 831, 833 (9th Cir. 1984) (holding that when an attorney for a criminal defendant sleeps through a substantial portion of the trial, such conduct is "inherently prejudicial").

74. Powell v. Alabama, 287 U.S. 45 (1932).

75. *See* Linton v. Perini, 656 F.2d 207, 212 (6th Cir. 1981) ("Basic trust between counsel and defendant is the cornerstone of the adversary system and effective assistance of counsel."), *cert. denied*, 454 U.S. 1162 (1982); Lee v. United States, 235 F.2d 219, 221 n.5 (D.C. Cir. 1956) ("The relationship between attorney and client is highly confidential, demanding personal faith and confidence in order that they may work together harmoniously.") (citation omitted). *But see* Morris v. Slappy, 461 U.S. 1, 13-14 (1983) (holding that the sixth amendment does not guarantee a "meaningful relationship" between an accused and his counsel).

76. United States v. Badalamenti, 614 F. Supp. 194, 196 (S.D.N.Y. 1985).

77. *Id. See generally* Alschuler, *The Defense Attorney's Role in Plea Bargaining*, 84 YALE L.J. 1179, 1180 (1975) (advancing the view that "[the] guilty plea system leads even able, conscientious, and highly motivated attorneys to make decisions that are not really in their clients' interests").

fee arrangements in criminal cases.[78] The application of criminal forfeiture to attorneys' fees places the lawyer defending a RICO or CCE defendant in the position of having violated this ethical rule.

The forfeiture statutes give an attorney a strong incentive to remain ignorant about certain facts of his client's case. To avoid forfeiting his fee, the attorney must demonstrate that he was reasonably without cause to know that the property used to pay the fee was subject to forfeiture.[79] The attorney must choose between his own pecuniary interests in collecting his fee and his duty to be fully knowledgeable about his client's case.[80] Application of criminal forfeiture is inimical to the kind of uninhibited communication so necessary to the attorney-client relationship. The attorney-client privilege encourages full disclosure and communication between client and attorney.[81] In order to make the showing necessary to avoid forfeiture, the court may require that the lawyer disclose information that is at least arguably protected by the attorney-client privilege.[82] As a general rule, the attorney-client privilege does not protect fee information.[83] An exception to this general rule exists, however, when the "disclosure of such information would implicate that client in the very criminal activity for which legal advice was sought."[84] To the extent that the disclosure of fee information reveals the existence of unaccounted-for assets, this exception applies. Just as forfeiture encourages the lawyer to remain ignorant about the origins

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78. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.5(d)(2) (1983) ("A lawyer shall not enter into an arrangement for, charge, or collect . . . a contingent fee for representing a defendant in a criminal case."); *see also* United States v. Badalamenti, 614 F. Supp. 194, 196 (S.D.N.Y. 1985).

79. *See supra* notes 47-49 and accompanying text.

80. *See supra* note 51 and accompanying text.

81. Upjohn Co. v. United States, 449 U.S. 383, 389 (1981); Fisher v. United States, 425 U.S. 391, 403 (1976). For examples of state laws on attorney-client privilege, see CAL. EVID. CODE § 954 (Deering 1986); N.J. STAT. ANN. § 2A:84A-20 (West 1976); N.Y. CIV. PRAC. LAW § 4503 (McKinney 1963 & Supp. 1986).

82. United States v. Rogers, 602 F. Supp. 1332, 1348-49 (D. Colo. 1985).

83. United States v. Jeffers, 532 F.2d 1101, 1115 (7th Cir. 1976), *aff'd in part, vacated in part on other grounds*, 432 U.S. 137 (1977); *In re* Michaelson, 511 F.2d 882, 888 (9th Cir.), *cert. denied*, 421 U.S. 978 (1975).

84. United States v. Hodge & Zweig, 548 F.2d 1347, 1353 (9th Cir. 1977) (citation omitted); *see In re* Grand Jury Investigation (Tinari), 631 F.2d 17, 19 (3d Cir. 1980), *cert. denied*, 449 U.S. 1083 (1981). *But see* Payden v. United States (*In re* Grand Jury Subpoena Duces Tecum Dated Jan. 2, 1985), 605 F. Supp. 839, 846 (S.D.N.Y.) (rejecting the incrimination rationale for protecting fee information in such circumstances), *rev'd on other grounds*, 767 F.2d 26 (2d Cir. 1985).

of his client's assets, so it also encourages the client to withhold this information.[85]

C. *Prosecutorial Abuse*

Because of its broad language, commentators have criticized RICO for raising the possibility of prosecutorial abuse.[86] To the extent that the criminal forfeiture provisions of RICO and CCE apply to attorneys' fees, they pose a similar threat. One cannot assume that prosecutors will abuse their power under the criminal forfeiture statutes. Nevertheless, the possibility of abuse that these statutes raise ought to be enough to prevent an interpretation of RICO and CCE that threatens the attorney with a possible loss of fees.[87]

Criminal forfeiture allows the prosecutor to interfere with the defendant's choice of attorney. Through strategic use of restraining orders to freeze a defendant's assets, the prosecutor may make it difficult, if not impossible, for the defendant to find an attorney to take his case.[88] By preventing the defendant from choosing his lawyer, the government can dictate, if not who the attorney will be, at least who he will not be.[89] Wielding the possibility of forfeiture, the prosecutor is able to relegate RICO and CCE cases to overworked public defenders' offices where they may be overwhelmed by the state's superior resources.[90]

In response to the particular burdens that the forfeiture provisions place on attorney-client communications, the Justice De-

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85. *See* Fisher v. United States, 425 U.S. 391, 403 (1976):

> As a practical matter, if the client knows that damaging information could more readily be obtained from the attorney following disclosure than from himself in the absence of disclosure, the client would be reluctant to confide in his lawyer and it would be difficult to obtain fully informed legal advice.

86. *See generally* Bradley, *Racketeers, Congress, and the Courts: An Analysis of RICO*, 65 IOWA L. REV. 837 (1980); Tarlow, *supra* note 31.

87. *See, e.g.*, United States v. Huber, 603 F.2d 387, 395-96 (2d Cir. 1979) ("We note, however, that the potentially broad reach of RICO poses a danger of abuse where a prosecutor attempts to apply the statute to situations for which it was not primarily intended. Therefore we caution against undue prosecutorial zeal in invoking RICO."), *cert. denied*, 445 U.S. 927 (1980).

88. United States v. Badalamenti, 614 F. Supp. 194, 197-98 (S.D.N.Y. 1985) ("[T]he constitutional problem is not one of choice of counsel; nor is it one of getting retained lawyers to work. The problem is the unlikelihood of obtaining a lawyer *at all* if the lawyer will incur forfeiture of his fee upon the client's conviction.") (emphasis in original).

89. *See* Riley, *U.S. Changes Fee Forfeiture Policy*, Nat'l L.J., July 29, 1985, at 3, col. 1, 32, col. 2 (comments of Ivan Fisher, defense counsel in the *Badalamenti* case).

90. *See supra* notes 71-72 and accompanying text.

partment has established a set of guidelines designed to ensure the uniform application of criminal forfeiture.[91] These guidelines provide for centralized decisionmaking by requiring the approval of the Assistant Attorney General for the Criminal Division before a U.S. Attorney's office either institutes proceedings to forfeit an asset transferred to a lawyer as legal fees or enters an agreement to exempt such an asset from forfeiture.[92] The guidelines make clear, however, that even those assets transferred for legitimate legal services actually rendered will be subject to forfeiture if the attorney either knows or has reason to know that an asset represents proceeds from an illegal activity.[93] The stated policy of the Justice Department is to seek forfeiture only when there are reasonable grounds to believe that the attorney either has actual knowledge or reason to know that an asset has been derived from criminal activity.[94] Reasonable grounds must be based on information other than the compelled disclosure of confidential communications.[95] The guidelines qualify this protection greatly, however, by stating that fee information generally is not privileged.[96] The protection offered by the guidelines is further undercut by the Department's disclaimer that "they are not intended to, do not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal, nor do they place any limitations on otherwise lawful litigative prerogatives of the Department of Justice."[97] Taking the forfeiture decision away from individual U.S. Attorneys may provide some protection for the constitutional rights of RICO and CCE defendants. But the extent of this protection in the hands of a central authority susceptible to political pressures is questionable. The government's promise to make more judicious use of forfeiture with respect to attorneys' fees does not alleviate the problem. The threat of forfeiture, at least as much as its application, serves to deter attorneys from representing RICO or CCE defendants.

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91. *See* JUSTICE DEPARTMENT GUIDELINES, *supra* note 10, at 3003.

92. *Id.*

93. *Id.* at 3004.

94. *Id.*

95. *Id.* The guidelines require that the Assistant Attorney General for the Criminal Division authorize any subpoena to an attorney for fee information. The four prerequisites to authorization are: first, the information must not be privileged; second, reasonable attempts to obtain the information from alternate sources must be exhausted; third, there must be reasonable grounds to believe the information is needed; and fourth, the need for the information must outweigh potential adverse effects on the attorney-client relationship. *Id.* at 3007.

96. *Id.* at 3007. *But see supra* note 84 and accompanying text.

97. JUSTICE DEPARTMENT GUIDELINES, *supra* note 10, at 3003.

A second mechanism for potential abuse involves the government's use of its subpoena power to compel an attorney's testimony relating to fee arrangements with the client. Such information is typically sought either as a prerequisite to the government's assertion of its claim of forfeiture or as evidence of unaccounted-for assets of the defendant. Such a subpoena not only has an adverse effect on attorney-client communications,[98] but compliance with the subpoena, preventing the attorney from representing the client,[99] results in prejudice to the client's interests.[100] The subpoena gives the prosecutor the power to disqualify opposing counsel almost at will, as well as to interfere actively with the attorney-client relationship.[101] Here, too, the Justice Department has said that it will limit its use of the subpoena against defense attorneys,[102] but to depend on the prosecutor's wise use of discretion offers the RICO or CCE defendant little protection.[103]

III. A SUGGESTED CONSTRUCTION OF THE CRIMINAL FORFEITURE STATUTES

Forfeiture of attorneys' fees raises serious constitutional questions, both with regard to the due process rights of third parties[104] and the defendant's right to counsel.[105] Wherever possible, the Court seeks to avoid any construction of a statute that raises a constitutional question.[106] An interpretation that ex-

98. *See supra* notes 81-85 and accompanying text.

99. *See* Roe v. United States (*In re* Grand Jury Subpoena Served Upon Doe), 759 F.2d 968, 973 (2d Cir. 1985) ("Thus, by calling an attorney as a witness against his client, the Government is surely setting the stage for the attorney's ultimate disqualification."), *vacated on other grounds*, 781 F.2d 238 (2d Cir.), *cert. denied*, 106 S. Ct. 1515 (1986).

100. United States v. Badalamenti, 614 F. Supp. 195, 200 (S.D.N.Y. 1985) (finding that prejudice to the defendant because of a subpoena served on his attorney, likely to result in the attorney's disqualification after the attorney had spent nearly six months in trial preparation, "will be very great").

101. *In re* Special Grand Jury No. 81-1 (Harvey), 676 F.2d 1005, 1009 (4th Cir.), *vacated and withdrawn upon indictment*, 697 F.2d 112 (4th Cir. 1982):

> When a subpoena is issued against an attorney in an ongoing attorney-client relationship, the attorney may well be placed in the position of becoming a witness against his client or risking contempt. In either case, there is a strong possibility that a wedge will be driven between the attorney and the client and the relationship will be destroyed.

(footnotes omitted).

102. *See supra* note 95 and accompanying text.

103. *See supra* text accompanying note 97.

104. *See supra* notes 28-33 and accompanying text.

105. *See supra* notes 58-85 and accompanying text.

106. United States v. Rumely, 345 U.S. 41, 45 (1953) ("[I]f a serious doubt of consti-

empts from forfeiture attorneys' fees legitimately paid for legal services rendered in connection with a RICO or CCE defense avoids such problems. By limiting this exemption from forfeiture to reasonable attorneys' fees, transfer to the attorney is prevented from becoming a mechanism whereby RICO and CCE defendants can escape the sanction altogether. Such an interpretation is consistent with the legislative history of the 1984 amendments as well as the notion that the attorney is entitled to a reasonable fee for his services.

A. Legislative History

An examination of the legislative history of the 1984 amendments shows that Congress was particularly concerned with the use of preconviction transfers as a device allowing defendants to avoid forfeiture.[107] In codifying relation back, Congress meant to permit the voiding of preconviction transfers made at less than "arm's length" that allowed the defendant to avoid forfeiture, and to close a "potential loophole" in the forfeiture statutes.[108] The legislative history states that relation back was not meant to apply forfeiture to "innocent *bona fide* purchasers of the defendant's property."[109]

The forfeiture language exempts the transferee who can establish that he was reasonably without cause to believe the property was subject to forfeiture.[110] The Senate report on the 1984

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tutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.") (quoting Crowell v. Benson, 285 U.S. 22, 62 (1932)).

107. S. REP. No. 225, *supra* note 6, at 195-96, *reprinted in* 1984 U.S. CODE CONG. & AD. NEWS at 3378-79:

> [T]he criminal forfeiture provisions of the RICO and CCE statutes fail adequately to address the phenomenon of defendants defeating forfeiture by removing, transferring, or concealing their assets prior to conviction. . . . Thus, a person who anticipates that some of his property may be subject to criminal forfeiture has not only an obvious incentive, but also ample opportunity, to transfer his assets or remove them from the jurisdiction of the court prior to trial and so shield them from any possibility of forfeiture.
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> . . . .
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> In sum, present criminal forfeiture statutes do not adequately address the serious problem of a defendant's pretrial disposition of his assets. Changes are necessary both to preserve the availability of a defendant's assets for criminal forfeiture, and, in those cases in which he does transfer, deplete, or conceal his property, to assure that he cannot as a result avoid the economic impact of forfeiture.

108. *Id.* at 200-01, *reprinted in* 1984 U.S. CODE CONG. & AD. NEWS at 3383-84.

109. *Id.* at 201, *reprinted in* 1984 U.S. CODE CONG. & AD. NEWS at 3384.

110. 18 U.S.C. § 1963(c) (Supp. II 1984); 21 U.S.C. § 853(c) (Supp. II 1984).

amendments provides: "[This] provision should be construed to deny relief to third parties acting as nominees of the defendant or who have knowingly engaged in sham or fraudulent transactions. The standard for relief reflects the principles concerning voiding of transfers set out in 18 U.S.C. [§] 1963(c), as amended by the bill."[111] Though the statutory language is not necessarily inconsistent with congressional intent as expressed in the legislative history, neither is it limited to the kinds of transactions against which Congress professed to have directed its efforts. Where a transferee does not act as the defendant's nominee and is not a party to a sham transfer, he still may be unable to make the showing the statute requires to avoid forfeiture. Even though the attorney, in all likelihood, is aware of the illicit origins of money used to pay his fee,[112] or will be held to be on notice of the possibility of forfeiture,[113] payment of the fee is for services rendered. Such a fee payment is an arm's length transaction rather than a sham.[114] Forfeiture of attorneys' fees in such a case will do nothing to further Congress's avowed purpose.

Further evidence that Congress, in the 1984 amendments to criminal forfeiture, did not intend to apply forfeiture to attorneys' fees exists in a House Judiciary Committee report on an earlier version of the CCE amendments whose language is essentially the same as the 1984 amendments. In that report the Committee stated explicitly that "[n]othing in this section [dealing with in personam forfeiture] is intended to interfere with a person's Sixth Amendment right to counsel."[115] Although the Senate report on the final version of the forfeiture amendments makes no mention of the right to counsel in connection with

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111. S. REP. No. 225, *supra* note 6, at 209 n.47, *reprinted in* 1984 U.S. CODE CONG. & AD. NEWS at 3392 n.47.

112. *See supra* notes 50-51 and accompanying text.

113. *See supra* note 49 and accompanying text.

114. United States v. Rogers, 602 F. Supp. 1332, 1348 (D. Colo. 1985).

115. H.R. REP. No. 845, 98th Cong., 2d Sess., pt. 1, at 19 n.1 (1984) [hereinafter cited as H.R. REP. No. 845]. The court in United States v. Rogers, 602 F. Supp. 1332 (D. Colo. 1985), read this statement as a recognition of "the need to insure the right to counsel in the context of third-party forfeiture of assets." *Id.* at 1347.

But see Payden v. United States (*In re* Grand Jury Subpoena Duces Tecum Dated Jan. 2, 1985), 605 F. Supp. 839, 849 n.14 (S.D.N.Y.), *rev'd on other grounds*, 767 F.2d 26 (2d Cir. 1985). *Payden* rejected the *Rogers* court's interpretation of the legislative history. The court focused on the report's next sentence, which stated, "The Committee, therefore does not resolve the conflict in the District Court opinions on the use of restraining orders that impinge on a person's right to retain counsel in a criminal case." H.R. REP. No. 845, *supra*, at 19 n.1. The court concluded that, in the context of the second sentence, the first sentence demonstrated only an intention to leave the resolution of the issue to the courts. *Payden*, 605 F. Supp. at 850 n.15.

criminal forfeiture,[116] in light of the threat to constitutional rights presented by forfeiture of attorneys' fees, RICO and CCE should not be so applied absent some clear indication that this was Congress's intent.[117]

B. Reasonable Attorneys' Fees

A construction of the RICO and CCE amendments that exempts from forfeiture money paid for legal services rendered complies with the general principle that an attorney is at least entitled to reasonable compensation for the value of his work.[118] Courts have held that legal fees should be based upon principles of quantum meruit[119] and have exercised their inherent power to reduce fees they find excessive.[120] Although determining a valuation for legal fees is an admittedly difficult task,[121] the courts' responsibilities for supervision of the bar include the responsibility of seeing that attorneys' fees are not excessive.[122] That the court must determine a reasonable amount for legal fees in RICO and CCE cases imposes no unusual burden.

A quantum meruit measure of attorneys' fees would guarantee the attorney just compensation, thus preserving the defendant's right to counsel. At the same time, limiting attorneys' fees in RICO and CCE cases will facilitate criminal forfeiture's original purpose of deterring crime. A quantum meruit limit would create a presumption that, to the extent that attorneys' fees exceed

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116. *See* S. REP. No. 225, *supra* note 6.

117. *See* United States v. Badalamenti, 614 F. Supp. 194, 196 (S.D.N.Y. 1985).

118. *See* Glick v. United States Civil Serv. Comm'n, 567 F. Supp. 1483, 1489 (N.D. Ill. 1983) (stating that where there is no express agreement between attorney and client, the attorney may recover the reasonable value of services rendered), *aff'd*, 799 F.2d 753 (7th Cir. 1986); *see also* Mattioni, Mattioni & Mattioni, Ltd. v. Ecological Shipping Corp., 530 F. Supp. 910, 914 (E.D. Pa. 1981) (concluding that although the attorney is precluded from suing on the terms of a contingency fee contract by virtue of an invalid provision, the attorney is not disallowed from proceeding in quantum meruit).

119. Glick v. United States Civil Serv. Comm'n, 567 F. Supp. 1483, 1489 (N.D. Ill. 1983), *aff'd*, 799 F.2d 753 (7th Cir. 1986); Mattioni, Mattioni & Mattioni, Ltd. v. Ecological Shipping Corp., 530 F. Supp. 910, 914 (E.D. Pa. 1981); Grimm v. Whitney-Fidalgo Seafoods, 458 F. Supp. 5, 6 (S.D.N.Y. 1978); DelNoce v. Delyar Corp., 457 F. Supp. 1051, 1054 (S.D.N.Y. 1978).

120. *See* Coffelt v. Shell, 577 F.2d 30, 32 (8th Cir. 1978); *In re* Michaelson, 511 F.2d 882, 888 (9th Cir.), *cert. denied*, 421 U.S. 978 (1975).

121. *See generally* R. ARONSON, ATTORNEY-CLIENT FEE ARRANGEMENTS: REGULATION AND REVIEW (1980).

122. Allen v. United States, 606 F.2d 432, 435 (4th Cir. 1979); Esser v. A.H. Robins Co., 537 F. Supp. 197, 200 (D. Minn. 1982); *see also* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.5 (1984) (requiring that a lawyer's fee be reasonable).

the reasonable value of the legal services, the defendant is doing something other than compensating his attorney—namely, using attorneys' fees as a disguise to avoid the forfeiture penalty. Because this is the problem Congress meant to address with the forfeiture amendments,[123] the courts should limit attorneys' fees forfeitures to such cases.

CONCLUSION

The government's use of the criminal forfeiture provisions of RICO and CCE to compel lawyers representing convicted clients to forfeit their fees creates far more problems than it solves. Although forfeiture of attorneys' fees may be consistent with the language of the statutes, it is not consistent with the constitutional guarantees of due process and right to counsel, nor is it consistent with Congress's intent in enacting criminal forfeiture. An exemption from forfeiture for reasonable attorneys' fees will solve these problems and also maintain criminal forfeiture's value as a deterrent to crime by preventing the use of sham transfers to avoid the forfeiture penalty.

—Gregory Merz

123. *See supra* notes 107-14 and accompanying text.