



1986

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Daniel A. Guy Jr.
University of Baltimore School of Law

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Recommended Citation

Guy, Daniel A. Jr. (1986) "Comments: Forfeiture of Attorneys' Fees under the Comprehensive Forfeiture Act of 1984: Not What Congress Ordered," *University of Baltimore Law Review*: Vol. 16: Iss. 1, Article 5.
Available at: <http://scholarworks.law.ubalt.edu/ublr/vol16/iss1/5>

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FORFEITURE OF ATTORNEYS' FEES UNDER THE COMPREHENSIVE FORFEITURE ACT OF 1984: NOT WHAT CONGRESS ORDERED.

In 1984 Congress amended the criminal forfeiture provisions of the RICO and CCE statutes. The Department of Justice has interpreted the amended laws to allow for the restraint and forfeiture of assets transferred by a defendant to defense counsel as compensation for legitimate legal services. This comment explores the legislative history of the amendments, as well as the constitutional and ethical concerns which arise under the Department's interpretation, to conclude that Congress did not intend bona fide attorneys' fees to be subject to the forfeiture provisions of the RICO and CCE statutes.

I. INTRODUCTION

During the summer of 1983, the federal grand jury for the Eastern District of Virginia began an investigation into allegations that Christopher Reckmeyer was engaged in drug trafficking activities.¹ At that time, Reckmeyer retained the services of the law firm of Caplin & Drysdale, paying \$25,000 into an escrow account for those services. On January 14, 1985, the government was granted a restraining order on an *ex parte* application pursuant to the Continuing Criminal Enterprise Act (CCE), 21 U.S.C. § 853(e). This restraining order prohibited Reckmeyer from transferring any of his assets, which allegedly constituted proceeds of illegal drug sales. At that time, however, Caplin & Drysdale's fees totaled \$51,000. The following day, the federal grand jury returned an indictment charging Christopher Reckmeyer with violations of federal drug trafficking and tax laws. Caplin & Drysdale continued to represent Reckmeyer, although all of his assets — including extensive real estate holdings, gems, and \$200,000 in cash — were frozen by the restraining order and allegedly subject to forfeiture.

On March 7, 1985, Reckmeyer filed a motion requesting modification of the restraining order to exclude attorneys' fees from the reach of the restraining order and possible forfeiture. On March 14th, Reckmeyer pled guilty to engaging in a Continuing Criminal Enterprise in violation of 21 U.S.C. § 848. The following day, the court denied the motion seeking modification of the government's restraining order. The court, however, notified Caplin & Drysdale that the firm could raise the issue of the forfeitability of their fees in a post-forfeiture third-party petition pursuant to CCE, 21 U.S.C. § 853(n)(2). Reckmeyer subsequently was sentenced to a period of incarceration and an order of forfeiture was entered encompassing virtually all of his assets pursuant to CCE, 21 U.S.C. § 853(c). This order included forfeiture of the \$25,000

1. The following factual situation arises from *United States v. Reckmeyer*, 631 F. Supp. 1191 (E.D. Va. 1986).

Reckmeyer previously had paid into the Caplin & Drysdale escrow account.

Caplin & Drysdale's total charges for the Reckmeyer defense, all legitimately documented, totaled \$270,512.99. Following the order of forfeiture, and in accordance with the previous instructions of the court, Caplin & Drysdale petitioned the court for a hearing to adjudicate the validity of their interests in Reckmeyer's forfeited assets. The court granted the law firm's request for a hearing and concluded that, because the firm was a good faith provider of a service, it was entitled to the entire fee. Moreover, according to the court, the Comprehensive Forfeiture Act of 1984 was not intended to encompass the forfeiture of bona fide attorneys' fees.

United States v. Reckmeyer is one of many cases which have arisen as a result of attempts by the United States Department of Justice to classify legal defense fees as forfeitable assets under the Comprehensive Forfeiture Act of 1984.² This Act amended the existing forfeiture provisions of the Racketeer Influenced and Corrupt Organizations Act (RICO),³ and added a new forfeiture provision to the CCE statute.⁴

Procedurally, the issue of the forfeiture of attorneys' fees can arise in two instances. First, a prosecutor might rely on the deterrent effect created when a general forfeiture count is present in an indictment.⁵ Most defense attorneys approached by a client under such an indictment will refuse the case. Those defense attorneys who accept such cases will enter appearances conditioned on a finding that attorneys' fees are not forfeitable.⁶ Second, the prosecutor might decide to seek a restraining order or an injunction, pursuant to RICO, 18 U.S.C. § 1963(e), precluding any transfer of assets by the accused to a defense attorney.⁷

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2. Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, tit. III, Comprehensive Forfeiture Act, 302, 303, 98 Stat. 2040, 2044 (Oct. 24, 1984). See *infra* notes 6 and 7 for similar cases.
 3. 18 U.S.C. §§ 1961-1968 (1984). The RICO forfeiture provisions are codified at 18 U.S.C. § 1963 (Supp. 1986). See *infra* note 9.
 4. 21 U.S.C. § 848 (1984). The CCE forfeiture provisions are now codified at 21 U.S.C. § 853 (Supp. 1986). See *infra* note 9.
 5. FED. R. CRIM. P. 39(e) requires that the forfeiture count be included in the information or indictment. The presence of a forfeiture count in the indictment will instill in defense attorneys the fear of the loss of attorneys' fees. Accordingly, it is unlikely that attorneys will accept a defendant's retainer. The accused will also be denied appointed counsel because he is not "financially unable" to hire private counsel. See *infra* note 63.
 6. For cases presenting this scenario, see *United States v. Bassett*, 632 F. Supp. 1308 (D. Md. 1986) (attorneys' fees held exempt from forfeiture where defendants were charged with violations of the CCE statute); *United States v. Badalamenti*, 614 F. Supp. 194 (S.D.N.Y. 1985) (attorneys' fees held exempt from forfeiture where defendants were charged with violating both the RICO and CCE statutes); *In Re Grand Jury Subpoena Dated January 2, 1985*, 605 F. Supp. 839 (S.D.N.Y. 1985) (stating in dicta that attorneys' fees are subject to forfeiture under the CCE statute), *rev'd on other grounds*, 767 F.2d 26 (2d Cir. 1985).
 7. RICO, 18 U.S.C. § 1963(e) allows the government to gain restraining orders and injunctions prior to and subsequent to the filing of the indictment. In several cases,

Under RICO and CCE, as amended by the Comprehensive Forfeiture Act, the government must include allegations in its criminal indictment that the defendant has gained profits or proceeds from violations of either of these statutes and that the gains are subject to forfeiture.⁸ To prevent the defendant from defeating forfeiture by transferring the illegal gains to a third party prior to a judicial condemnation, Congress included identical "relation back" language in both the RICO and CCE statutes.⁹ Under the "relation back" provisions, forfeiture of specific property identified in the statutes takes effect immediately upon the commission of a precluded act, vesting rights to the property in the government at that time, even though judicial condemnation does not occur until much later. RICO, 18 U.S.C. § 1963(c) provides:

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

the forfeiture issue arose due to the issuance of a restraining order or injunction. In *United States v. Thier*, No. 85-4857, slip op. (5th Cir. Oct. 10, 1986), for example, the defendant was charged with violations of the CCE statute and the government was granted a restraining order through an *ex parte* proceeding. The district court declined to grant the defendant's motion for a modification of the restraining order which would allow transfers of funds for the retention of legal counsel. The court of appeals remanded the case back to the district court, advising the court to balance the defendant's loss of right to counsel of choice and other potential adverse effects arising from a pretrial refusal to exempt defense counsel's fees from forfeiture against the government's interest in forfeiture. Similarly, in *United States v. Ianniello*, 664 F. Supp. 452 (S.D.N.Y. 1985), the defendant was charged with violating the RICO statute and the government was granted a restraining order on an *ex parte* application prior to the filing of the indictment. The defense counsel entered appearances conditioned on the granting of a motion that would exempt attorneys' fees from the reach of the restraining order and the motion was ultimately granted. Likewise, in *United States v. Rogers*, 602 F. Supp. 1332 (D. Colo. 1985), the defendant was charged with violations of the RICO statute and the government filed a motion for a restraining order contemporaneously with the indictment. The court denied the motion and held that attorneys' fees are exempt from forfeiture. See also *United States v. Reckmeyer*, 631 F. Supp. 1191 (E.D. Va. 1986) (for factual setting and holding, see the Introduction to this Comment).

8. See 18 U.S.C. § 1963(e)(1), (2), and (3) (Supp. 1986). (Note that subsection (e)(1)(a) requires that the indictment contain allegations that property would be subject to forfeiture in the event of conviction.) See also FED. R. CRIM. P. 31(3) which permits a special verdict of forfeiture when the indictment includes a forfeiture count.
9. Because the language of the RICO and CCE forfeiture statutes are essentially identical in their present form, the author has chosen to cite only to the RICO forfeiture statute in the text of this comment. See RICO, 18 U.S.C. § 1963 (Supp. 1986). Any difference between the RICO and the CCE forfeiture statutes will be noted as they arise.

believe that the property was subject to forfeiture under this section.¹⁰

The plain language of the forfeiture provisions, therefore, neither expressly includes nor exempts assets transferred to defense attorneys for payment of legitimate legal fees. Furthermore, the issue is not addressed specifically in the legislative history of the statutes.¹¹ As a result, conflicting interpretations of the forfeiture provisions have arisen. The Department of Justice consistently has contended that, upon the defendant's conviction, the "relation back" language permits forfeiture of any of the defendant's tainted assets which have been transferred to pay legitimate attorneys' fees.¹² In conjunction with this position, the Department believes that assets intended to be transferred to a defense attorney in payment of legitimate fees can be subjected to a restraining order or injunction under RICO, 18 U.S.C. § 1963(e).¹³ The federal courts, as well as the American Bar Association (ABA)¹⁴ and the National Association of Criminal Defense Lawyers (NACDL),¹⁵ generally have opposed this interpretation on the grounds that Congress did not intend attorneys' fees to be forfeitable and because the forfeiture provisions as interpreted by the Department would violate sixth amendment guarantees of right to counsel and promote ethical improprieties within the criminal defense bar.¹⁶

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10. Provisions for the voiding of pre-conviction transfers did not exist in either the RICO or CCE statutes prior to the amendment of these statutes in 1984.
 11. See SENATE REPORT, *infra* note 18. In *United States v. Rogers*, 602 F. Supp. 1332, 1336 (D. Colo. 1985), the court commented on the haphazard passage of the Comprehensive Crime Control Act: "[N]ot all of the Act's pages were included in the copy provided the President for his signature The exact contents of the Act were so uncertain that portions of the bill not enacted were included in the United States Code Annotated advance sheet of the law."
 12. See UNITED STATES ATTORNEYS' MANUAL §§ 9-111 thru 9-111.700; Justice Department Guidelines on Forfeiture of Attorneys' Fees, *reprinted* in 38 Crim. L. Rep. (B.N.A.) 3001-08 (Oct. 2, 1985) [hereinafter Guidelines]. The Guidelines were issued in September of 1985 to clarify the Justice Department's assertions that assets transferred in payment of legitimate legal defense fees are subject to forfeiture under the Comprehensive Forfeiture Act of 1984.
 13. *Id.*
 14. See AMERICAN BAR ASSOCIATION, CRIMINAL JUSTICE SECTION - REPORT TO THE HOUSE OF DELEGATES. Approved as American Bar Association policy by the American Bar Association House of Delegates - July 1985 [hereinafter ABA POLICY]; Statement of James M. Russ on behalf of the American Bar Association, before the Subcommittee on Crime, Committee on the Judiciary, United States House of Representatives - Concerning Forfeiture of Attorneys' Fees (Miami, Florida November 25, 1985.) [hereinafter ABA STATEMENT].
 15. See Statement of Neal R. Sonnett on behalf of the National Association of Criminal Defense Lawyers, before the Subcommittee on Crime, Committee on the Judiciary, United States House of Representatives - Oversight Hearings Regarding the Comprehensive Forfeiture Act of 1984 (Miami, Florida November 25, 1985) [hereinafter NACDL STATEMENT].
 16. See generally ABA STATEMENT, *supra* note 14 and NACDL STATEMENT, *supra* note 15. These two groups appeared before Congress to discuss the negative implications of the Department's position. The ABA and NACDL pointed out that the

The comment will begin with an outline of the evolution of the RICO and CCE criminal forfeiture provisions. After this general background, the comment will discuss how the judiciary and the Department of Justice have employed statutory construction to arrive at opposite conclusions as to whether Congress intended the forfeiture provisions to include attorneys' fees. Next, the constitutional implications of the position of the Department of Justice will be analyzed. Specifically, the comment will consider whether the forfeiture of attorneys' fees abrogates the fundamental right to counsel guaranteed by the sixth amendment. In addition, certain ethical dilemmas presented by the forfeiture of attorneys' fees will be discussed. The comment will conclude with suggestions as to how the current controversy concerning the forfeiture of attorneys' fees should be resolved.

II. EVOLUTION OF THE RICO AND CCE FORFEITURE PROVISIONS

Criminal forfeiture was codified in the United States Code for the first time in 1970¹⁷ in response to the expanding economic power of racketeers and drug traffickers.¹⁸ The criminal forfeiture provisions were embodied in the Organized Crime Control Act¹⁹ and in the Comprehensive Drug Abuse Prevention and Control Act,²⁰ which codified RICO and

legislative intent as to the RICO and CCE forfeiture provisions is at best unclear and that the Department's interpretation raises both constitutional and ethical concerns for the parties involved. Particularly, the ABA and NACDL argued that if attorneys' fees are forfeitable, the defendant will be denied the right to counsel as guaranteed by the sixth amendment and that the adversary process established in our criminal justice system will be disturbed. *Id.*

17. Criminal forfeiture, as opposed to civil forfeiture, traditionally was avoided in this country on the grounds that such a provision would be unconstitutional. U.S. Const. art. III, § 3, cl. 2 (forfeiture of estate). *See also* Corruption of Blood or Forfeiture of Estate, 18 U.S.C. § 3563¹ (1985), ("No conviction or judgment shall work corruption of blood or any forfeiture of estate."). It is of particular note that this statute was repealed effective November 1, 1986. *See* Pub. L. 98-473, tit. II, Sec. 212(a)(2), 98 Stat. 1987 (1984). For a general discussion of the difference between civil and criminal forfeiture, see Senate Report, *infra* note 18.
18. *See* S. REP. NO. 225, 98th Cong., 2d Sess. 191-214, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS 3374-97 [hereinafter SENATE REPORT] ("Congress recognized 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.").
19. Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 943 (1970) (codified as Racketeer Influenced and Corrupt Organizations, 18 U.S.C. §§ 1961-1968 (1984)). The criminal forfeiture provisions were codified at 18 U.S.C. § 1963 (Supp. 1986) and provided for the forfeiture of "any interest acquired or maintained in violation of Section 1962."
20. Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1265 (1970) (codified as Continuing Criminal Enterprise, 21 U.S.C. § 848 (1981)). The criminal forfeiture provisions of 21 U.S.C. § 848(2) (1981) provided for the forfeiture of any profits or interest obtained in the illegal enterprise. For further discussion of the history of these criminal forfeiture provisions, see

CCE, respectively. Congress envisioned the RICO and CCE criminal forfeiture provisions as the government's ultimate weapon in the battle against organized crime.²¹

Ten years later, however, it became apparent that the forfeiture provisions were not being utilized to their full potential.²² An investigation on the failure of forfeiture enforcement was instituted. This investigation culminated in a report by the General Accounting Office (GAO)²³ which placed primary responsibility for the failure of effective enforcement of the forfeiture provisions on the Department of Justice.²⁴ Ambiguities in the language of the provisions and the federal judiciary's interpretation of these ambiguities also were found to be contributing factors.²⁵ The GAO

Comment, *Criminal Forfeiture: Attacking the Economic Dimension of Organized Narcotics Trafficking*, 32 AM. U. L. REV. 227 (1982-83).

21. See H.R. REP. NO. 1444, 91st Cong., 2d Sess., reprinted in 1970 U.S. CODE CONG. & ADMIN NEWS 4566-70; S. REP. NO. 9-617, 91st Cong., 1st Sess. 160 (1969).
22. COMPTROLLER GENERAL, UNITED STATES GENERAL ACCOUNTING OFFICE, ASSET FORFEITURE - A SELDOM USED TOOL IN COMBATING DRUG TRAFFICKING, p.9 (April 10, 1981) [hereinafter GAO Report]. Ten years after the passage of the forfeiture provisions, forfeiture had only been sought in 98 drug trafficking cases. *Id.* at 9-11.
23. *Id.*
24. See GAO Report, *supra* note 22, at 16. ("The Department of Justice has simply not exercised the kind of leadership and management necessary to make asset forfeiture a widely used law enforcement technique. . . . Investigators and prosecutors lacked incentive and expertise to pursue forfeiture in major drug cases.")
25. See GAO Report, *supra* note 22, at 30. The report elaborated on the fact that the judiciary had interpreted the forfeiture provisions to have a very limited scope; indirect profits of illicit activities were held not to be forfeitable in RICO cases. See *United States v. McManigal*, 708 F.2d 276 (7th Cir.), vacated 464 U.S. 979 (1983); *United States v. Marubeni Am. Corp.*, 611 F.2d 763 (9th Cir. 1980). The scope of the RICO and CCE forfeiture provisions subsequently was given an expansive interpretation in *United States v. Martino*, 681 F.2d 952 (5th Cir. 1982), *aff'd sub nom. Russello v. United States*, 464 U.S. 16 (1983).

In addition, the statutes were ambiguous as to the extent to which assets had to be traced to illicit activity in order to be forfeitable and as to the exact judicial procedures to be followed in forfeiture cases. In early drafts of the amendments to RICO, subsection (d) was written to allow the government to seek forfeiture of "substitute assets" (those not gained illegally) if the defendant had been successful in defeating forfeiture by transferring illegally obtained gains. It is interesting to note, however, that this provision was not included in the final draft of the RICO amendments which were signed into law. Apparently, last minute fears arose that the inclusion of such a provision would jeopardize the constitutionality of the statute. A similar "substitute asset" forfeiture provision was deleted from a related bill. See Comprehensive Drug Penalty Act of 1984, H. R. REP. NO. 845, 98th Cong., 2d Sess., pt. 1, at 10-12 (1984), Report of the Committee on the Judiciary ("Any attempt to forfeit 'substitute assets' which has no 'nexus' to the crime in 'in personam' forfeiture is a giant step in the direction of 'forfeiture of estate' and would needlessly raise [eighth amendment issues].").

As previously noted the statutory prohibition against 'forfeiture of estate' was abolished recently. See *supra* note 17. In conjunction with this action, the issue of "substitute asset" forfeiture has recently received attention in the courts. See *United States v. Ginsburg*, 773 F.2d 798, 801 (7th Cir. 1985); *United States v. Connor*, 752 F.2d 566 (11th Cir. 1985).

CCE 21 U.S.C. § 853 (Supp. 1986), never included a provision permitting the

report concluded with recommendations that Congress amend the RICO and CCE forfeiture provisions and that the United States Attorney General evaluate and revise the forfeiture enforcement procedures of the Department of Justice.²⁶

Congress responded to the GAO Report in 1984 by passing the Comprehensive Crime Control Act, which included the Comprehensive Forfeiture Act.²⁷ The passage of the Comprehensive Crime Control Act rendered the RICO and CCE forfeiture provisions essentially identical by expanding the reach of the RICO forfeiture provision and by adding a new forfeiture provision to the CCE statute.²⁸ The portions of the statutes of particular importance to this discussion include: provisions for the forfeiture of both direct and indirect proceeds of prohibited activity;²⁹ provisions for the voiding of transfers of assets to third parties ("relation back");³⁰ provisions establishing procedures for the issuance of restraining orders and injunctions to prevent transfers of assets;³¹ and provisions establishing procedures to protect the interests of third-parties in forfeited assets.³²

III. CONFLICTING STATUTORY CONSTRUCTION

A. *Interpretation of the Forfeiture Provisions by the Department of Justice*

The position of the Department of Justice is premised on the finding that an attorney is not a bona fide purchaser for value of property in the possession of the defendant.³³ RICO, 18 U.S.C. § 1963(c) grants an exemption from forfeiture to third-party transferees of the defendant if the transferee can demonstrate that he is a "bona fide purchaser for value" and was "reasonably without cause to believe that the property was subject to forfeiture." In *Reckmeyer*, a seller of cattle to the defendant was found to have met this definition.³⁴ However, because an attorney is charged with knowledge of the contents of the indictment filed against a client,³⁵ one logically may conclude that the attorney cannot be held to

forfeiture of substitute assets. 21 U.S.C. § 853(d) (Supp. 1986) provides for a rebuttable presumption that any property of a person convicted of violating the CCE statute is subject to forfeiture.

26. See GAO report, *supra* note 22, at 41-42.

27. See *supra* note 2.

28. See *supra* note 9.

29. 18 U.S.C. § 1963(a)(1), (2), and (3) (Supp. 1986).

30. 18 U.S.C. § 1963(c) (Supp. 1986).

31. 18 U.S.C. § 1963(e)(1), (2), and (3) (Supp. 1986).

32. 18 U.S.C. § 1963(m)(1-7) (Supp. 1986). For the identical language in the CCE statute, see 21 U.S.C. § 853(n)(1-7) (Supp. 1986).

33. See GUIDELINES, *supra* note 12, at 3001-3003.

34. See *United States v. Reckmeyer*, 627 F. Supp. 412 (E.D. Va. 1986). The court found that "[a]t the time of the transaction, Smith was dealing in good faith with Reckmeyer and was unaware of his drug trafficking activities." See also *United States v. Reckmeyer*, 628 F. Supp. 616 (E.D. Va. 1986).

35. Case law predating the forfeiture amendments established that knowledge of the

be "reasonably without cause to believe that the property was subject to forfeiture," as required for exemption under subsection (c).³⁶ Because an attorney is not a bona fide purchaser for value, the Department has argued that the "relation back" language of subsection (c) of the RICO and CCE statutes permits the government to seek forfeiture of assets legitimately transferred to defense counsel if the accused ultimately is convicted.³⁷

The Department of Justice also has argued that "[t]he legislative history indicates that Congress explicitly rejected the notion that attorneys' fees are exempt from forfeiture."³⁸ This position is premised on a citation in the Senate Reports to *United States v. Long*,³⁹ a case pre-dating the 1984 amendments to the forfeiture provisions in which assets transferred to a defense attorney were forfeited.⁴⁰ The facts of *Long*, however, support the contention that attorneys' fees are forfeitable only if they are transferred as part of a fraud or sham.⁴¹ Other cases relied on by the Department of Justice in which attorneys' fees were subjected to forfeiture also pre-date the 1984 amendments, and have been rejected as unpersuasive by the courts.⁴²

indictment, and thus knowledge of the forfeiture count, was sufficient to put an attorney on notice of potential forfeiture. See *United States v. Raimondo*, 721 F.2d 476, 478 (4th Cir. 1983), cert. denied, 105 S. Ct. 133 (1984); *United States v. Long*, 654 F.2d 911 (3d Cir. 1981). Consequently, an attorney is unable to meet either of the elements expressly required for exemption under RICO, 18 U.S.C. § 1963(c) (Supp. 1986).

36. An attorney who accepts a RICO or CCE case is not a "bona fide purchaser for value." "A bona fide purchaser for value is one who, without notice of another's claim of right to, or equity in, property prior to his acquisition of title, has paid vendor a valuable consideration." BLACK'S LAW DICTIONARY 161 (5th ed. 1981). See also *supra* note 34.
37. See GUIDELINES, *supra* note 12.
38. GUIDELINES, *supra* note 12, at 3003.
39. 654 F.2d 911 (3d Cir. 1981).
40. See SENATE REPORT, *supra* note 18 at 200 n.28, 1984 U.S. CODE CONG. & ADMIN NEWS at 3383 n.28.
41. *United States v. Long*, 654 F.2d 911, 912 (3d Cir. 1981). In *Long*, the defendant remained a fugitive while his attorney continued to correspond with him. The defendant persuaded his attorney to travel to the Bahamas and to take title to a plane belonging to the defendant in order for the attorney to receive a retainer as well as payment for past debts. As a result of the sale of the plane, the attorney received a substantial amount of money for unperformed legal services. In light of all the facts, including the failure of the defendant to appear, the court refused to dismiss an order restraining transfer of the plane.
42. The government also has relied on *United States v. Raimondo*, 721 F.2d 476 (4th Cir. 1983) (per curiam) and *United States v. Bello*, 470 F. Supp. 723 (S.D. Cal. 1979) to support the proposition that legitimately transferred attorneys' fees are subject to forfeiture. In *Raimondo*, however, the court commented that "[o]ur disposition of this case does not bar Rosen [the defendant's lawyer] or his law firm from opposing the government's forfeiture of the realty conveyed to them." 721 F.2d 476, 478 (4th Cir. 1983). See also *infra* note 55.

B. Interpretation of the Forfeiture Provisions by the Judiciary

The federal courts have applied the principles of statutory construction in concluding that Congress did not intend forfeiture of legitimately transferred attorneys' fees. Although attorneys' fees are not exempted expressly from forfeiture under RICO, 18 U.S.C. § 1963(c), the courts have looked past the express language of subsection (c) and have found justification for the exemption of attorneys' fees from forfeiture in the more expansive language of the legislative history discussing that subsection.⁴³

One portion of the Senate Reports states, "[t]he purpose of [subsection (c)] is to permit the voiding of certain preconviction transfers and so close a potential loophole in current law whereby the criminal forfeiture provisions could be *avoided* by transfers that were not 'arms length'."⁴⁴ The Reports state further that RICO, 18 U.S.C. § 1963(c) was included in the 1984 amendments in response to "the phenomenon of defendants *defeating* forfeiture by removing, transferring or concealing their assets prior to conviction."⁴⁵ By definition, however, allowing a defendant to transfer assets to pay *legitimate* legal defense fees does not aid in the defeat or avoidance of the forfeiture sanctions because the transfer is at arm's length.⁴⁶ Exempting legitimately transferred legal fees from forfeiture does nothing more than guarantee the accused the right to retain counsel.

The "bona fide purchaser" language from RICO, 18 U.S.C. § 1963(c) referred to above is also present in RICO, 18 U.S.C. § 1963(m)(6)(B), which establishes ancillary hearing procedures for the protection of the interests of third parties in forfeited assets.⁴⁷ The portion of the legislative history devoted to discussion of RICO, 18 U.S.C. § 1963(m) also elaborates on the exemption language of RICO, 18 U.S.C. § 1963(c).⁴⁸ A footnote to this portion of the Senate Reports states that "[t]he provision should be construed to deny relief to third parties acting

43. See SENATE REPORT, *supra* note 18, at 200-201, 1984 U.S. CODE CONG. & ADMIN NEWS at 3383-84.

44. *Id.* (emphasis added).

45. *Id.* at 195, 1984 U.S. CODE CONG. & ADMIN NEWS at 3378 (emphasis added).

46. Congress enacted the RICO and CCE statutes in an attempt to attack the economic power bases of racketeers and drug traffickers. *Id.* at 191, 1984 U.S. CODE CONG. & ADMIN NEWS at 3374. See also *Russello v. United States*, 464 U.S. 16, 26-29 (1983). The amendments of 1984 were passed primarily to defeat the avoidance of forfeiture. Allowing the defendant to transfer assets to his defense attorney in payment of legitimate fees, however, does not defeat the forfeiture sanctions. If the defendant is convicted, the jury retains the power to separate the defendant from any remaining assets by use of the special forfeiture verdict. The forfeiture sanctions are defeated only if the defense attorney accepts assets as part of a sham or fraudulent transaction.

47. The ancillary hearing procedures for the CCE statute are codified at 21 U.S.C. § 853(n) (Supp. 1986).

48. See Senate Report, *supra* note 18, at 207-09, 1984 U.S. CODE CONG. & ADMIN NEWS at 3390-92.

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."⁴⁹ These discussions make it evident that Congress amended RICO and CCE in 1984 in order to preserve and bolster the effectiveness of the statutes by precluding the evasion of forfeiture through sham or fraudulent transactions.

By definition, however, assets *legitimately* transferred in payment of legal defense fees are not "sham or fraudulent transactions." Nor is a defense attorney a "nominee" of the defendant. In light of the discussion in the Senate Reports, the courts have determined that Congress did not intend for the forfeiture provisions to reach assets transferred in payment of legitimate legal defense fees. In *United States v. Bassett*,⁵⁰ for example, the court stated:

[I]t is reasonable to conclude that the problem faced by lawmakers, and the problem they sought to remedy, was that of defendants purposefully hiding assets arguably subject to forfeiture to avoid relinquishing them to the government. A reasonable inference to be drawn is that it is such sham, fraudulent transactions which Congress specifically intended to single out for remedy. The attorney representing a client under indictment for a RICO or a [CCE] drug related offense is certainly not 'innocent' of knowledge that the money with which he is paid might be tainted. He is certainly not, however, just a bogus conduit for this money when providing bona fide legal services.⁵¹

49. *Id.* at 209 n.47, 1984 U.S. CODE CONG. & ADMIN NEWS at 3392 n.47.

50. 632 F. Supp. 1308 (D. Md. 1986).

51. *Id.* at 1315-16. *Accord* *United States v. Reckmeyer*, 631 F. Supp. 1191, 1196 (E.D. Va. 1986) ("Exempting legitimate attorneys' fees from forfeiture would not undermine [Congressional purpose] because '[a]n attorney who receives funds in return for services legitimately rendered operates at arm's length and not as part of an artifice or sham,' *United States v. Rogers*, 602 F. Supp. at 1348, and therefore a defendant who is found guilty will still be separated from his economic base."); *United States v. Badalamenti*, 614 F. Supp. 194, 198 (S.D.N.Y. 1985) ("[T]he statute was not intended and should not be construed to reach bona fide fees charged by the attorney for the defense of the criminal charge."); *United States v. Ianniello*, 664 F. Supp. 452, 455-56 (S.D.N.Y. 1985) ("[I]t is evident that bona fide attorneys' fees paid to defense counsel who serve the defendant's needs within our adversary system were not intended to be forfeitable by Congress, for it cannot be said that such fees were paid as part of an artifice or sham to avoid forfeiture."). *See also* ABA STATEMENT, *supra* note 14; NACDL STATEMENT, *supra* note 15. *But cf.* In re Grand Jury Subpoena *Duces Tecum* Dated January 2, 1985, 605 F. Supp. 839, 849 n.14 (S.D.N.Y. 1985) ("One who receives funds with the knowledge that the funds are subject to forfeiture cannot be said to have entered into an arm's length transaction regardless of the price paid for the goods or service."); *United States v. Thier*, No. 84-60055-23, slip op. at 5 (W.D. La. 1985) ("This court cannot overlook the fact that there is no exception carved out in the appropriate statute for the use of one's assets to pay attorney's fees or to provide living expenses. I cannot presume that the Congress so intended."); GUIDELINES, *supra* note 12, at 3303 ("Exemption

Further, as noted by the court in *Reckmeyer*, there appears to be no need to subject transfers of attorneys' fees to potential forfeiture. If conviction occurs, the objective of the criminal forfeiture statutes is satisfied because the defendant remains entirely deprived of illegally obtained assets, including those fraudulently paid to attorneys, through the special forfeiture verdict.⁵² In addition, under current case law, the government is permitted to attach legitimately earned assets ("substitute assets") in order to replace tainted funds transferred by the defendant prior to conviction.⁵³ Such an approach would be available to the government if the defendant did in fact transfer tainted assets to defense counsel. In the final outcome, the convicted defendant is separated completely from his economic base, the result intended by the forfeiture provisions.

Thus, the federal courts tend to find sufficient language in the Senate Reports to reject the interpretation of the Department of Justice.⁵⁴ The courts rejected the pre-1984 cases cited by the Department in support of the proposition that Congress intended attorneys' fees to be subject to the forfeiture provisions on the ground that the analysis of these cases lacked any discussion of the right to counsel issues which are present in the current controversy.⁵⁵

IV. SIXTH AMENDMENT CONSIDERATIONS

The courts, in choosing to exempt attorneys' fees from the purview of the forfeiture statutes, conclude, in dicta, that the constitutionality of the RICO and CCE forfeiture provisions would be in jeopardy if Congress had not intended to exempt attorneys' fees.⁵⁶ Specifically, the de-

of attorneys' fees also would undermine substantially the purpose of the third party forfeiture provisions.").

52. 18 U.S.C. § 1963(c) (Supp. 1986).

53. See *United States v. Ginsburg*, 773 F.2d 798 (7th Cir. 1985); *United States v. Connor*, 752 F.2d 566 (11th Cir. 1985). See generally discussion at *supra* note 25.

54. See *United States v. Thier*, No. 85-4857, slip op. (5th Cir. Oct. 10, 1986); *United States v. Ianniello*, 664 F. Supp. 452 (S.D.N.Y. 1985); *United States v. Bassett*, 632 F. Supp. 1308 (D. Md. 1986); *United States v. Reckmeyer*, 631 F. Supp. 1191 (E.D. Va. 1986); *United States v. Badalamenti*, 614 F. Supp. 194 (S.D.N.Y. 1985); *United States v. Rogers*, 602 F. Supp. 1332 (D. Colo. 1985); *United States v. Sobczak*, S-Cr 85-00033, (Order dated Sept. 6, 1985) (N.D. Ind.). But see *In Re Grand Jury Subpoena Dated January 2, 1985*, 605 F. Supp. 839 (S.D.N.Y.), *rev'd on other grounds*, 767 F.2d 26 (2d Cir. 1985); *United States v. Thier*, No. 84-60055-23 (W.D. La. 1985) (unpublished). See also GUIDELINES, *supra* note 12.

55. As stated by Judge Kane, "[w]hile relevant to what the pre-amendment case law provided, these cases are not particularly enlightening. None of these analyzes the intent of Congress in enacting the newly amended forfeiture provisions and none consider the constitutional requisites which must direct statutory construction." *United States v. Rogers*, 602 F. Supp. 1332, 1350 (D. Colo. 1985).

56. See *United States v. Ianniello*, 664 F. Supp. 452, 456 (S.D.N.Y. 1985). In *Ianniello*, the court stated:

Even absent this guidance in the legislative history, this court still would be required to find that attorneys' fees paid for legitimately rendered attorneys' services are not forfeitable. It is a fundamental principle of statutory interpretation that in deciding among possible interpretations

defendant would be deprived of the right to counsel as guaranteed by the sixth amendment,⁵⁷ a right which is absolute in a criminal prosecution.⁵⁸ The sixth amendment right to counsel also encompasses the qualified right to counsel of choice, which is contingent on the defendant's ability to pay.⁵⁹ According to the Sixth Circuit, this qualified right to counsel of choice "must be carefully balanced against the public's interest in the orderly administration of justice."⁶⁰

The defendant will be denied the absolute right to counsel if an indictment includes a general forfeiture count because no private attorney will accept the defendant's retainer due to the threat of post-conviction forfeiture.⁶¹ Moreover, because the defendant is able financially to hire private counsel, the defendant probably will be precluded from gaining the assistance of the Public Defender pursuant to the Criminal Justice Act, 18 U.S.C. § 3006A.⁶² The problem is not averted by assurances from the prosecution that it will not oppose the appointment of the Public Defender.⁶³ Because the defendant is unable to retain either private or appointed counsel, it is quite clear that the right to counsel is denied by the threat of forfeiture of attorneys' fees.

A more controversial argument exists as to whether the right to counsel of choice is denied by the government's use of restraining orders and injunctions. The qualified right to counsel of choice arguably is abridged when the defendant is restrained from transferring his assets to a defense attorney of his choice. This is because no private attorney is likely to accept a RICO or CCE case without an advance retainer. As a result, the defendant will be forced to utilize government appointed counsel because of a form of indigency caused by the restraining order.⁶⁴ One court has held that it is irrelevant that the defendant is rendered indigent by an act of government, and thus unable to hire counsel of

of a statute, the court must select an interpretation that appears to be consistent with the constitutionality of the statute.

57. The sixth amendment provides in pertinent part: "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense." U.S. CONST. amend. VI.
58. See *Scott v. Illinois*, 440 U.S. 367 (1979); *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Powell v. Alabama*, 287 U.S. 45 (1932).
59. *United States v. Inman*, 483 F.2d 738, 739-40 (4th Cir. 1973), *cert. denied*, 416 U.S. 988 (1974).
60. *Linton v. Perini*, 656 F.2d 207, 209 (6th Cir. 1981), *cert. denied*, 454 U.S. 1162 (1982).
61. See *supra* note 6.
62. See *United States v. Badalamenti*, 614 F. Supp. 194, 197 (S.D.N.Y. 1985) (Leval, J.). In *Badalamenti*, the court stated: "The wealthy defendant cannot claim poverty and apply for appointed counsel. His problem is not inability to pay a legal fee but that lawyers will refuse to accept his retainer and will refuse to represent him. He can get neither a paid lawyer, nor a free one."
63. See *United States v. Ianniello*, 644 F. Supp. 452 (S.D.N.Y. 1985). Even with such assurances, the fact remains that the defendant is not "financially unable" to hire counsel and is therefore unqualified for appointed counsel. *Id.* at 457.
64. See *supra* note 7.

choice.⁶⁵ In *United States v. Ianniello*,⁶⁶ however, Judge Motley of the United States District Court for the Southern District of New York indicated that such actions may be a deprivation of the right to counsel of choice.⁶⁷ However, the court decided that the issue could be settled on other grounds, holding that counsel of choice was a necessity of life under the facts of that case.⁶⁸

The right to counsel of choice issue arose indirectly in *United States v. Badalamenti*,⁶⁹ where the defendant was charged with violating both the RICO and CCE statutes.⁷⁰ The government suspected that the defendant had transferred as much as \$500,000.00 to his defense attorney. The court held that the transferred attorneys' fees should not be subjected to forfeiture. In dicta, however, the court suggested that funds remaining in the defendant's hands could be subjected to a restraining order or injunction, notwithstanding that these funds were earmarked as legal defense fees.⁷¹ The court did not elaborate on any of the implications of this statement and failed to recognize that such an approach would make restraint dependent on the speed with which the defendant transfers attorneys' fees. Despite the problems inherent in the *Badalamenti* reasoning, the United States District Court for the Western District of Louisiana adopted this approach in *United States v. Thier*.⁷²

If the courts were to adopt the *Badalamenti* approach, the Department of Justice would be encouraged to seek pre-indictment restraining orders in all RICO and CCE cases where forfeiture was a possibility. Depending upon how stringently the courts apply the burden of proof set

65. *United States v. Bello*, 470 F. Supp. 723 (S.D. Cal. 1979). Because this case was decided before the 1984 amendments to the RICO and CCE statutes, it probably will not be given much weight by the courts currently addressing the issue. See *United States v. Thier*, No. 85-4857, slip op. at 175 (5th Cir. Oct. 10, 1986) (Rubin, J., concurring) ("This defendant, made indigent by government action, should not be dependent on the list of those available for routine cases.").

66. *United States v. Ianniello*, 644 F. Supp. 452 (S.D.N.Y. 1985).

67. *Id.* at 456 ("Statutory procedures or prosecutorial power also are not permitted to unreasonably abridge the right to counsel of choice.").

68. *Id.* at 459. In *Ianniello*, the court considered the length of time that the defendant's counsel had been preparing for trial, the complexity of the issues of law involved in the defense, and the additional time which would be required for replacement counsel to prepare for trial and decided that counsel of choice was a "necessity in life." The same factors were considered in *United States v. Thier*, No. 84-60055-23, slip op. at 4-5, (W.D. La. 1985) (unpublished). In *Thier*, however, the court concluded that, because no trial date had been established, the restraining order would not be amended to allow payment of fees to counsel of choice.

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

70. *Id.* at 195.

71. *Id.* at 198 ("Nor does the discussion apply to the seizure of funds in the hands of the defendant that he expects to use to pay his attorney.") (emphasis omitted). See also *United States v. Rogers*, 602 F. Supp. 1332, 1347 (D. Colo. 1985) ("Congress intended different treatment of assets transferred to third parties and assets in the hands of defendant.").

72. *United States v. Thier*, No. 84-60055-23, slip op. at 4, (W.D. La. 1985) (unpublished). The counsel of choice issues which arise under such an approach were not addressed in either *Badalamenti* or *Thier*.

down in RICO, 18 U.S.C. § 1963(e) for the granting of restraining orders,⁷³ the government might be able to achieve the same result it would were forfeiture permitted — the exclusion of the most qualified private defense counsel.⁷⁴ Several courts have observed, however, that such veto power by the government over the defendant's choice of counsel should not be tolerated.⁷⁵ Moreover, a court would be faced with a difficult dilemma if the defendant paid counsel a retainer prior to the issuance of a restraining order and the legal fee subsequently surpassed the amount of the retainer in the middle of the proceedings. The court could not possibly dismiss chosen counsel at that time.⁷⁶ On the other hand, due process concerns arise if the defendant's right to counsel of choice is based on the defendant's ability to "beat the restraining order."⁷⁷

In *Reckmeyer*, the court held that "there is no legitimate countervailing government interest which would be served by the forfeiture of bona fide attorney's fees" and that, accordingly, the right to counsel of choice should not be denied.⁷⁸ The court concluded that the government's sole interest under the forfeiture provisions, the prevention of eva-

73. The government's burden changes depending on the point in time that the restraining order or injunction is sought and whether the order sought is permanent or temporary in nature. See RICO, 18 U.S.C. § 1963(e)(1) and (2) (Supp. 1986).

74. See *United States v. Thier*, No. 85-4857, slip op. at 175 (5th Cir. Oct. 10, 1986) (Rubin, J., concurring) ("The tool of the restraining order, thus put into the hands of the prosecution, gives the Government the power to exclude vigorous and specialized defense counsel.").

75. See *United States v. Rogers*, 602 F. Supp. 1333, 1350 (D. Colo. 1985). Accord *United States v. Reckmeyer*, 631 F. Supp. 1191, 1197 (E.D. Va. 1986) ("[S]ubjecting attorney's fees to forfeiture would give the government the power to decide whether a defendant will be represented by a particular counsel of his own choice. . . . Given the potential for prosecutorial abuse or manipulation, such a veto power over the defendant's choice of counsel is intolerable.").

76. The scenario described in the text is similar to the events which transpired in the *Reckmeyer* case. See *supra* note 1 and accompanying text.

77. See *United States v. Ianniello*, 644 F. Supp. 452, 459 (S.D.N.Y. 1985). In *Ianniello*, the court stated: "The right to counsel of one's own choosing is, as previously mentioned, only a qualified right. The protection provided by the right to choice of counsel, however, is no more than preventing arbitrary dismissal of chosen counsel." *Id.* (citing *In Re Grand Jury Subpoena Served Upon John Doe, Esq.*, 759 F.2d 968, 975-76 (2d Cir. 1985)). Basing the right to counsel of choice on whether the defendant transferred funds to private counsel on the day before the indictment was filed, as opposed to the day after, is clearly arbitrary.

78. See *United States v. Reckmeyer*, 631 F. Supp. 1191, 1196 (E.D. Va. 1986). See also *United States v. Thier*, No. 85-4857, slip op. at 173 (5th Cir. Oct. 10, 1986) (Rubin, J., concurring) (" . . . I would require the district court to permit the defendant access to sufficient funds to pay the reasonable costs of his defense and necessary living expenses for himself and his family unless the government can show a compelling reason why this should not be done.").

The majority of the appellate court in *Thier* rejected the notion that an exemption from forfeiture for attorneys' fees was mandatory. However, the court expressly adopted the reasoning of *Bassett*, *Ianniello*, *Reckmeyer*, *Badalamenti* and *Rogers* that the defense attorney's necessary knowledge of the charges against a client could not preclude the attorney from receiving payment out of the client's forfeited assets. The majority suggested that "[s]hould the district court refuse to exempt attorneys' fees prior to trial and the defendant be convicted, the attorney

sion of the forfeiture statutes, was not of such import as to outweigh the accused's right to counsel of choice. The *Reckmeyer* court properly viewed the use of restraining orders in the same light as the use of the "relation back" language previously discussed — as an instrument to protect the effectiveness of the criminal forfeiture statutes. Accordingly, if forfeiture of attorneys' fees is not necessary to preserve the effectiveness of the forfeiture provisions, then restraining the transfer of attorneys' fees is equally unnecessary and deprivation of the right to counsel of choice is unwarranted. The approach taken in *Reckmeyer* is more desirable than that suggested in *Badalamenti*. *Reckmeyer* reflects a more reasonable interpretation of the forfeiture provisions in light of their ultimate objectives and, at the same time, recognizes the constitutional implications of the denial of counsel of choice.

The Department believes that the judicial decisions exempting attorneys' fees from forfeiture and restraint are incorrect,⁷⁹ because exemption of these funds would allow the defendant "to use the proceeds of criminal activity to obtain counsel to defend against charges arising from that very criminal activity."⁸⁰ This approach, however, totally disregards the practice in our criminal justice system of presuming that an accused is innocent until proven guilty.⁸¹ The Department's position assumes that any person charged with a RICO or CCE violation is guilty when the

may demonstrate in a post-conviction hearing that he rendered legitimate services and is entitled to payment from the forfeited assets." *Thier* at 171.

This approach leaves many problems unresolved which the *Reckmeyer* approach settles. First, because many of the most qualified defense attorneys will not accept such a case without an advance retainer, counsel of choice will be denied. Second, many of the ethical concerns remain, particularly, concerns relating to whether defense counsel has accepted a criminal case on a contingency basis.

79. See GUIDELINES, *supra* note 12, at 3002. The Justice Department refers to *Rogers*, *Badalamenti* and *Ianniello* and asserts that they are incorrect. *Id.*

80. *Id.* The Justice Department's analysis is contradictory. At one point, the Guidelines state that attorneys' fees will be protected "if the defendant has sufficient funds at the time of the judgment of forfeiture to satisfy it." *Id.* The government need not trace the funds which are forfeited to a source of illegal activity. *Id.* at 3002 n.4. On the following page of the Guidelines however, the position is taken that the "defendant could take full advantage of his ill-gotten gains by intentionally transferring tainted assets in payment of attorney fees and retaining only legitimate assets." *Id.* at 3003.

The "substitute asset" provision, originally codified at 18 U.S.C. 1963(d) was deleted from the RICO amendment, but the courts have nevertheless allowed the government to seize assets which have not been traced to illegal activity. See *United States v. Anderson*, 782 F.2d 908 (11th Cir. 1986); *United States v. Ginsburg*, 773 F.2d 798 (7th Cir. 1985); *United States v. Conner*, 752 F.2d 566 (11th Cir. 1985).

81. See NACDL STATEMENT, *supra* note 15, at 16. ("The cherished precepts of fundamental fairness and Due Process, upon which our system of justice was established, demand that we not allow the imposition of punishment before there has been a judicial determination of guilt."); *United States v. Bassett*, 632 F. Supp. 1308, 1316 (D. Md. 1986) ("Even accepting, *arguendo*, the contention of the government that there is no right to use the proceeds of criminal activity to obtain counsel, at this point in time the funds of [the defendants] cannot be ineluctably considered proceeds of criminal activity, because they have not yet been convicted of this crime.").

indictment is filed. Furthermore, the Department has failed to proffer a legitimate public interest in denying RICO and CCE defendants the right to counsel of choice.⁸²

In addition to the arguments presented above against forfeiture, the ABA and NACDL argue that subjecting attorneys' fees to forfeiture impedes, rather than promotes, the government's interest in furthering the orderly administration of justice and effective assistance of counsel, the latter being guaranteed implicitly under the sixth amendment.⁸³ First, if attorneys' fees are potentially forfeitable, the defendant's chosen counsel, more likely than not, will withdraw his appearance from the case.⁸⁴ Withdrawal by defense counsel prior to trial undoubtedly would have a detrimental effect on the accused's defense.⁸⁵ Second, contrary to the Department's assertions,⁸⁶ counsel appointed by the court under the Criminal Justice Act, 18 U.S.C. § 3006A, would not provide adequate representation because: (a) court appointed counsel would not be available to advise the defendant prior to the issuance of the indictment or the issuance of a restraining order on matters as important as whether to utilize the protections of the fifth amendment during grand jury investi-

82. See *United States v. Reckmeyer*, 631 F. Supp. 1191, 1196 (E.D. Va. 1986) ("[T]here is no legitimate countervailing government interest which would be served by the forfeiture of bona fide attorneys' fees. The purpose of the criminal forfeiture statute is to strip racketeers and drug dealers of their 'economic bases' upon conviction.") (citations omitted). If an attorney receives tainted money for legitimately rendered services and the defendant subsequently is convicted, the defendant still will be separated completely from his economic power base, particularly in light of the trend of the "substitute asset" cases. See cases cited *supra* note 80.

83. See ABA STATEMENT, *supra* note 14 and NACDL STATEMENT, *supra* note 15.

84. In *Rogers*, *Bassett*, and *Thier* the federal district courts pointed out that defense counsel had entered appearances conditioned on a determination that attorneys' fees are exempt from forfeiture. This seems to be the common approach for all defense counsel in RICO and CCE cases where the legal fee is alleged to be forfeitable. Thus, where it is determined that the attorneys' fees are forfeitable, it is unlikely that the counsel of choice would continue with the case. As stated by the United States District Court for the District of Colorado in *United States v. Rogers*:

The government would possess the ultimate tactical advantages of being able to exclude competent defense counsel as it chooses. By appending a charge of forfeiture to an indictment under RICO, the prosecutor could exclude those defense counsel which he felt to be skilled adversaries. . . . Due process cannot tolerate even the opportunity for such abuse of the adversary system.

United States v. Rogers, 602 F. Supp. 1332, 1350 (D. Colo. 1985).

85. *United States v. Badalamenti*, 614 F. Supp. 194, 196 (S.D.N.Y. 1985) ("[T]he RICO and CCE indictments to which the forfeiture provisions apply are generally big cases requiring months to prepare and try. . . ."). Substitute counsel, in whatever form, would be inadequate unless the trial was postponed until new counsel could properly prepare.

86. See GUIDELINES, *supra* note 12, at 3001 ("[A] defendant who establishes indigency is entitled to the assistance of court appointed counsel at each critical stage of the proceedings. . . ."); "[A] defendant who is indigent by virtue of a restraining order may have counsel of choice appointed, provided counsel is willing to accept appointment under the Criminal Justice Act.". *Id.* at 3002.

gations;⁸⁷ (b) counsel of choice probably would refuse appointment to the case since the Criminal Justice Act, 18 U.S.C. § 3006A(d), limits compensation for services rendered;⁸⁸ and, (c) should the federal public defender's office or court appointed counsel be assigned the case, the defendant may find himself represented by counsel lacking both the expertise and resources necessary to provide the defendant an adequate legal defense.⁸⁹ Third, effective assistance of counsel will be denied, because open and frank discussion between the attorney and the client will be impeded if the defendant realizes that the attorney may have to reveal confidences at a hearing pursuant to RICO, 18 U.S.C. § 1963(m), following trial.⁹⁰ In these various ways, subjecting attorneys' fees to forfeiture is detrimental to the adversary process upon which our criminal justice system is based.⁹¹

87. *United States v. Reckmeyer*, 631 F. Supp. 1191, 1197 n.3 (E.D. Va. 1986).

The availability of court-appointed counsel under the CJA is also inadequate because, due to threat of forfeiture of attorney's fees, individuals would be deprived of the opportunity to obtain any legal representation before they are officially charged or rendered 'financially unable' to hire their own counsel. Thus, during the pendency of a grand jury investigation, a defendant, who is not only presumed innocent but has not even been charged with a crime, could not obtain the advice of counsel on such matters as whether to assert his Fifth Amendment rights. *Id.*

88. *See* Criminal Justice Act, 18 U.S.C. 3006A(d)(1), (2) and (3) (1985). Although subsection (3) provides for the waiver of the maximum compensation provided in subsection (2), in practical terms, the most experienced defense attorneys will not be satisfied with the amount of compensation that the court ultimately will approve.

89. *See* *United States v. Rogers*, 602 F. Supp. 1332, 1349 (D. Colo. 1985). In *Rogers*, the court stated:

The retort to the claim of denial of counsel of one's choice, that appointed counsel is available, pays no more than lip service to due process and the right to counsel. This view ignores the exigencies of RICO cases. The costs of mounting a defense of an indictment under RICO are far beyond the resources or expertise of the average federal public defender's office which is already over taxed.

(*See also* *United States v. Thier*, No. 85-4857, slip op. at 175 (5th Cir. Oct. 10, 1986) (Rubin, J., concurring) ("Due process also requires the appointment of counsel for every indigent person accused of a crime, but courts appoint lawyers of average competence who typically have little experience in complex cases. No one would wish to be represented by appointed counsel in a case of this nature."))

90. If attorneys' fees are held forfeitable, the defense attorney may decide to accept the case and then argue for his fee at an ancillary hearing provided for under RICO, 18 U.S.C. § 1963(m) (Supp. 1986). *United States v. Reckmeyer*, 631 F. Supp. 1191, 1197 (E.D. Va. 1986) ("The many conflicts of interest created by the attorney having a pecuniary interest in the outcome of a criminal case would almost certainly deny the defendant his unqualified right to effective assistance of counsel."); *United States v. Ianniello*, 644 F. Supp. 452, 457 (S.D.N.Y. 1985) ("If the attorney were to advise his client of the possible disclosure, [in a future subsection (m) proceeding], the free flow of information required between attorney and client for an adequate defense would be chilled, depriving the defendant of effective representation under the Sixth Amendment."). For a discussion of the possible ethical violations such a relationship would foster, see *infra* notes 92-99 and accompanying text.

91. *Herring v. New York*, 422 U.S. 853, 862 (1975) ("The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best

V. ETHICAL IMPLICATIONS

Subjecting legitimate attorneys' fees to possible forfeiture creates several ethical dilemmas for those criminal defense attorneys who decide to accept RICO and CCE cases.⁹² Most of these ethical problems would not exist if attorneys' fees are exempted from forfeiture although some will arise regardless of the outcome of this issue. For example, an obvious conflict of interest arises for a defense attorney when the government subpoenas the attorney for information regarding the source and amount of his client's retainer fee. Generally, the government does not seek this information to aid in the forfeiture of attorneys' fees, but rather to prove that the defendant violated either the RICO or CCE statute.⁹³ Thus, in effect, the attorney is forced to assist the prosecution in its case-in-chief.

Other ethical issues arise from the forfeiture of attorneys' fees. An attorney who accepts a RICO or CCE case, notwithstanding that the defense fee has been determined to be subject to possible forfeiture, would be vulnerable to charges that he has accepted a criminal case on a contingency basis.⁹⁴ This is because the collection of the defense fee is contingent on the attorney's gaining an acquittal or conviction on a lesser charge for his client.⁹⁵ Such practices are against public policy for the protection of the attorney and client alike. The attorney should be guaranteed his fee regardless of the defendant's conviction and the defendant should be assured that defense counsel will negotiate in the defendant's best interest independent of fee considerations. If attorneys' fees are forfeitable, however, neither the attorney nor the client is protected. The attorney could litigate a case in hopes of winning a favorable verdict when the client's interests would be served best by a plea of guilty. On the other hand, the attorney could negotiate for a plea of guilty on lesser

promote the ultimate objective that the guilty be convicted and the innocent go free.").

92. *United States v. Badalamenti*, 614 F. Supp. 194, 196 (S.D.N.Y. 1985) ("A lawyer who was so foolish, ignorant, beholden or idealistic as to take the business would find himself in inevitable positions of conflict.").
93. The government uses the high amount of the fee to demonstrate that the defendant has earned profits in violation of RICO or CCE. See *United States v. Badalamenti*, 614 F. Supp. 194, 201 (S.D.N.Y. 1985) (In order to protect the defendant and his attorney, the government could present expert testimony as to the market range for the services of criminal defense lawyers for RICO or CCE caliber cases.). For other cases discussing these issues, see *In Re Grand Jury Subpoena Served Upon Doe*, 781 F.2d 238 (2d Cir. 1985); *United States v. Under Seal*, 774 F.2d 624 (4th Cir. 1985); *In Re Grand Jury Subpoena Duces Tecum Dated January 2, 1985*, 605 F. Supp. 839 (S.D.N.Y.), *rev'd on other grounds*, 767 F.2d 26 (2d Cir. 1985).
94. MARYLAND RULES OF PROFESSIONAL CONDUCT Rule 1.5(d)(2): "A lawyer shall not enter into an arrangement for, charge, or collect a contingent fee for representing a defendant in a criminal matter."
95. *United States v. Bassett*, 632 F. Supp. 1308, 1316 n.5 (D. Md. 1986) ("The contingency here, of course, is that the lawyers will only get paid if the defendants are acquitted or convicted of a lesser charge.").

charges, thereby protecting his fee, when the circumstances suggest that the proper approach would be to defend against the charges.

The defense attorney also has a duty and obligation to be as well informed as possible regarding the facts and circumstances of his client's case.⁹⁶ If attorneys' fees are forfeitable, however, the attorney is encouraged to remain ignorant of the source of his client's assets. This anomaly arises because the attorney may be required to attempt to demonstrate that he is a "bona fide purchaser for value" pursuant to an ancillary hearing under RICO, 18 U.S.C. § 1963(m). Further, the attorney is under a duty to protect the confidences of his client.⁹⁷ If the attorney argues that he was "reasonably without cause to believe that the property was subject to forfeiture," he will be in danger of violating these rules of confidentiality. The defense attorney inevitably would be required to reveal confidential information of the client if the attorney is to prevail at an ancillary hearing pursuant to RICO, 18 U.S.C. § 1963(m).

Finally, the attorney's pecuniary interest in the outcome of the case would have a debilitating effect on his ability to exercise independent professional judgment on behalf of a client.⁹⁸ As stated above, the attorney's independent judgment would be impaired substantially if collection of his fee were contingent upon his client's acquittal or conviction on a lesser charge.⁹⁹

VI. CONCLUSION

Serious constitutional and ethical concerns arise when the government attempts to seize or restrain the transfer of legitimate attorneys' fees in RICO and CCE cases. For this reason, the United States Depart-

96. MARYLAND RULES OF PROFESSIONAL CONDUCT Rule 1.3 ("A lawyer shall act with reasonable diligence and promptness in representing a client."); *United States v. Badalamenti*, 614 F. Supp. 194, 196 (S.D. N.Y. 1985) ("[The defense attorney's] obligation to be well informed on the subject of his client's case would conflict with his interest in not learning facts that would endanger his fee by telling him his fee was the proceeds of illegal activity.").

97. MARYLAND RULES OF PROFESSIONAL CONDUCT Rule 1.6(a) ("A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation. . . .").

98. MARYLAND RULES OF PROFESSIONAL CONDUCT Rule 1.7(b) ("A lawyer shall not represent a client if the representation of that client may be materially limited . . . by the lawyer's own interests. . . .").

99. *See United States v. Reckmeyer*, 631 F. Supp. 1191, 1197 (E.D. Va. 1986) ("[T]he attorney's obligation to negotiate a guilty plea which is in the client's best interest may conflict with his desire to have his client enter a plea that does not involve forfeiture."); *United States v. Ianniello*, 644 F. Supp. 452, 457 (S.D.N.Y. 1985)

Defense counsel may seek to negotiate a guilty plea by his client, motivated, not by his client's best interests, but rather by his own desire to avoid forfeiture of his fee. On the other hand, if the Government were unwilling to forego forfeiture of the legal fees in exchange for a guilty plea, the attorney's financial interest might lead him to advise his client to go to trial, hoping for a favorable forfeiture verdict, even if the client's interest in leniency would be served best by pleading guilty. *Id.*

ment of Justice should abandon its attempts to effectuate such forfeiture or restraint. This is especially so because the forfeiture or restraint of attorneys' fees is not necessary to attain the goals of the Comprehensive Crime Control Act of 1984. If the government satisfies the burden of proof established in RICO, 18 U.S.C. § 1963(m), the defendant can be restrained from transferring all but attorneys' fees and necessities for living. If convicted, the government can seize all of the defendant's remaining assets. Thus, if the defendant is convicted, the defendant ultimately is separated completely from his economic power base and the goals of the forfeiture provisions are met. By allowing the free transfer of attorneys' fees the government ensures that both the guilty and the innocent enjoy the constitutional right to counsel.

Until Congress acts to define specifically the scope of forfeiture, it appears that the courts will continue to exempt attorneys' fees from forfeiture.¹⁰⁰ If the Department of Justice continues with its current forfeiture program, Congress should amend the RICO and CCE forfeiture

100. At the date of this writing, only one federal appellate court has rendered an opinion addressing this issue. In *United States v. Thier*, No. 85-4857, slip op. (5th Cir. Oct. 10, 1986), the court held that "the defense attorney's necessary knowledge of the charges against his client cannot defeat his interest in receiving payment out of the defendant's forfeited assets for legitimate legal services." *Id.* at 170-71. Nevertheless, the court in *Thier* held that a mandatory exemption of attorneys' fees is not required prior to trial because the defense attorney is granted a remedy through post-conviction proceedings and will be compensated for legitimate fees after satisfying the required burden. The trend in the federal district courts is against either forfeiture or restraint or both. *See supra* note 54.

The government recently consolidated three separate appeals into one case before the United States Court of Appeals for the Fourth Circuit. *See United States v. Harvey*, Case No. 86-5025 (oral argument was heard on September 4, 1986, the action includes appeals from both the *Bassett* and *Reckmeyer* decisions).

After this comment went to press, the United States Court of Appeals for the Fourth Circuit issued a decision on the consolidated appeals in *United States v. Harvey*, (March 6, 1987, No. 86-5025). This court's analysis differed from the trend established in the lower federal courts, however, the result was the same.

The court first decided that Congress did intend that attorneys' fees be subjected to potential forfeiture under the Comprehensive Forfeiture Act of 1984. This conclusion was based on the express language of subsection (c) of the forfeiture provisions which provides a limited exemption for "bona fide purchasers for value" only. The court found the express language so clear as to preclude the necessity for judicial interpretation of the legislative history. In dicta, however, the court stated that the legislative history did not support an interpretation exempting attorneys' fees from forfeiture as the lower courts previously suggested.

Finding that attorneys' fees were within the scope of the forfeiture provisions, the court analyzed whether any of the defendant's constitutional rights had been violated. Because all the defendants had been represented by some counsel, the court refused to decide whether the mere threat of forfeiture could constitute a violation of the basic right to counsel. On the other hand, the court found that applications of the provisions directly challenged in the appeals had violated the defendants' sixth amendment right to counsel of choice. Specifically, the threat of forfeiture and restraining orders imposed against the defendants deprived the defendants of the ability to employ and pay legitimate attorneys' fees to private counsel to defend the charges. The right to counsel of choice is to be denied only when there is a countervailing governmental interest. The court held that the govern-

provisions to exempt attorneys' fees from both forfeiture and restraint. This could be accomplished by supplementing RICO, 18 U.S.C. § 1963(c) with the following statement: "Funds legitimately transferred in payment of legal defense fees are exempt from forfeiture and restraint under the provisions of this section provided that these funds are used to defend against criminal charges to which sixth amendment guarantees of right to counsel attach."

Although allowing an exemption from forfeiture and restraint for attorneys' fees will encourage the accused, if he is indeed a drug trafficker or racketeer, to attempt sham or fraudulent transfers to his attorney, a remedy other than the forfeiture and restraint of all attorneys' fees is available to avoid this problem. Should the government contest a particular transfer in a case where restraint is not used, the court could appoint a federal magistrate or other independent fact finder to determine the legitimacy of the fee through *in camera* proceedings. The independent fact finder could compare the particular fee with the fees of counsel of equivalent experience and learning in the particular geographical area to aid in its decision. In cases where the government successfully obtains a restraining order against the accused, the independent fact finder should be provided with an accounting of the accused's known holdings immediately following imposition of the restraining order. With this information the independent fact finder would be able to determine the legitimacy of the fee prior to approving the transfer.¹⁰¹ Although the privacy of the attorney-client relationship is disturbed somewhat by this suggested approach, it is a less harmful means of preventing sham and fraudulent transfers than is the forfeiture or restraint of attorneys' fees.

Congress clearly did not intend for the Comprehensive Forfeiture Act of 1984 to encompass the forfeiture of legitimately transferred attorneys' fees. Although the Justice Department's position is logical in light of the overall objective of criminal forfeiture, the forfeiture provisions should not be allowed to distort fundamental constitutional presumptions and rights. As the Fifth Circuit recently observed when considering the question of forfeiture and restraint of attorney fees: "The government should not be permitted to cripple the defendant at the outset of the struggle by depriving him of the funds he needs to retain counsel and to provide food for himself and his family. Even in the war against crime, due process forbids terrorism."¹⁰²

Daniel A. Guy, Jr.

ment's interest in preserving property for forfeiture does not outweigh the defendant's individual constitutional rights.

101. This fee information, however, should not be revealed to the government or to the court in order to avoid unnecessary prejudice against the defendant.

102. *United States v. Thier*, No. 85-4857, slip op. at 176 (5th Cir. Oct. 10, 1986) (Rubin, J., concurring).