Criminal Law: Criminal Forfeiture of Attorneys' Fees under RICO

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tions. Second, trade secret protection is minimized. Had the EPA been required to seek a warrant, Dow could have requested under law that any evidence obtained be given special protection as confidential. By allowing the EPA to secure detailed and sensitive pictures without a warrant, the scope of trade secret protection shrinks. Third, the approach forces unnecessary decisions between fundamental privacy interests and other values such as access to unrestricted sunlight or safety. Since the Court equated all types of aerial observation regardless of circumstance, roofs and walls are a must if privacy from close-up pictures and surveillance is to be preserved. Fourth, more intrusive forms of technological searches are not precluded. Though the Court suggests in dictum that a line may be drawn to preclude the type of photography taken by a satellite, there is no reasoning to support the distinction. Thus, reasonable expectations of privacy diminish as technological innovation becomes more accessible to the public.

The four-step administrative search analysis proposed here better balances the competing interests involved in any fourth amendment action. Searches would be defined primarily by intent, not by expectations. Once the determination is made that a search occurred, the focus of analysis turns to the reasonability of the search. Although some consideration of reasonable expectations are incorporated into this analysis, they are narrowly drawn and deduced from specific legislative enactments, rather than left open to judicial determination based on indeterminate factors. Searches must also be conducted according to a regular schedule with the privacy interests of the business entity firmly in mind. The approach is workable, understandable, and fair.

Applying the analysis to the facts in _Dow_, it is not a foregone conclusion that the EPA’s search would have been unconstitutional. The most critical determinations to such a finding would be the significance of air pollution as a federal interest, and probably more important, whether the EPA’s inspection scheme adequately provided for the protection of Dow’s legitimate privacy interests.

_Wade R. Wright_

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**Criminal Law: Criminal Forfeiture of Attorneys’ Fees Under RICO**

Until the enactment of the Racketeering Influenced and Corrupt Organization Act (RICO) in 1970,¹ forfeiture of assets based on a criminal conviction was a concept foreign to the laws of the United States.² When Congress

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enacted the criminal provisions of RICO, it adopted a new type of forfeiture known as criminal or in personam forfeiture. Unfortunately, in enacting RICO, Congress provided only the most fundamental statutory guidance on the appropriate procedures for implementing this new penal sanction. With the increasing use of RICO, courts are confronting the multiplicity of issues that encompass the legal transfer of a defendant's assets to the government based on a finding of guilt. Courts are struggling to accommodate this new penal sanction and to supply and define procedures where none exist.

This note addresses the diverse procedural problems presented by the increasing use of the criminal forfeiture provisions in RICO. In particular, this note focuses on the application of these vague provisions to the rights of nondefendant third party attorneys. The note first contends that the current procedures for criminal forfeiture under RICO violate the sixth amendment. The statute fails to provide procedural safeguards against deprivations of the right to counsel of one's own choice to the RICO defendant. The note then proposes that these forfeiture provisions violate the fifth amendment because the statute fails to provide protection against wrongful property deprivations to either the RICO defendant or third parties.

**Historical Background**

The Comprehensive Forfeiture Act of 1984 (CFA) was a conscious attempt by Congress to escalate the war on crime, while simultaneously offering minimal procedural safeguards ignored in RICO. The 1984 Act provides

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4. See, e.g., United States v. Cauble, 706 F.2d 1322, 1348 (5th Cir. 1983) (forfeiture issue should be withheld from jury until general verdict has been returned, at which time judge should instruct jurors and submit issue for special verdict), cert. denied, 465 U.S. 1005 (1984); United States v. Spilotro, 680 F.2d 612, 617 (9th Cir. 1982) (setting guidelines for restraining order to prevent RICO defendant from disposing of alleged forfeitable property); United States v. Veon, 549 F. Supp. 274, 280 (E.D. Cal. 1982) (government may not file *lis pendens* on alleged forfeitable property; government's interest does not vest until personal guilt of property owner has been established).


   Any . . . property [subject to forfeiture] 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 [post-trial] hearing . . . that he is a bona fide purchaser for value of such property who at the time of purchase was reasonably without cause to believe that the property was subject to forfeiture.


that "any property subject to forfeiture that is subsequently transferred to a
person other than the defendant may be the subject of a special verdict of
forfeiture." However, the Act imposes upon the transferee the burden of
establishing at a post-trial hearing that he is a bona fide purchaser for value
who was without cause to believe that the property was subject to forfeiture.8

Even before the enactment of the CFA, the judiciary attempted to define
and expand the blurred scope of RICO's forfeitable property "interests." For example, in Russello v. United States,9 the Supreme Court stated that
where the term "interest" is not specifically defined in the RICO statute, it is
assumed that the legislative purpose is expressed by the term's ordinary
meaning, which comprehends all forms of real and personal property, in-
cluding profits and proceeds.10 Consequently, the insurance proceeds the
petitioner received as a result of his arson activities constituted an "interest"
within the meaning of section 1963(a)(1) and were, therefore, subject to
forfeiture. This expansion of the term "forfeitable interest," as evidenced in
Russello, and its effect on the property rights of parties who are not defen-
dants has led to many claims by the defense bar challenging the RICO and
CFA forfeiture provisions.11

The long-term success derived by law enforcement from the use of
forfeiture under RICO and CFA depends not only on how regularly
forfeiture is pursued, but also on how well procedures established in those
statutes protect defendants and interested parties with valid objections to
forfeiture. The adequacy of those "protection procedures" is especially
suspect when the government seeks forfeiture of attorneys' fees. In requiring
the forfeiture of the assets used by a defendant to pay attorneys' fees, the
government loses nothing; rather, the government endeavors to curb the
practice of paying lawyers with the fruits of crime and of disguising the assets
of criminal organizations as attorneys' fees paid for services rendered.12

In United States v. Rogers,13 the Colorado federal district court stated that
RICO's forfeiture provisions do not require the forfeiture of attorneys' fees
paid for legitimate legal services. The court went on to explain that the

7. 18 U.S.C. § 1963(c) (Supp. III 1985) "Special verdict is a statement by the jury of the
facts it has found—in essence, the jury's answers to questions submitted to it; the court deter-
mines which party, based on those answers, is to have judgment." BLACK'S LAW DICTIONARY
1399 (5th ed. 1979).
10. Id. at 21.
11. Stone, Criminal Forfeiture of Attorneys' Fees Under RICO and CCE, 2 J. L. & ETHICS
541, 542 (1986). In short, a prosecutor may reduce the pool of counsel available to the defendant
and constrain the attorney's ability to act on the defendant's behalf merely by indicating an
intent to seek forfeiture of fees paid, even though the prosecutor may not have sufficient grounds
to restrain assets. Id. Because of the potential adverse effects on the defendant's ability to retain
adequate representation, this article argues that the forfeiture provision as applied to attorneys' fees is unconstitutional.
12. Id.
forfeiture provision's legislative history indicates that the only assets held by third parties that are forfeitable are those transferred as a sham or artifice. Because an attorney who receives funds for bona fide services rendered engages in neither a fraud nor a sham, such fees are not forfeitable.14

In sum, it is obvious that the government is pursuing a laudable objective of curbing the practice of paying lawyers with the fruits of crime. However, the government's objective is achieved at the expense of jeopardizing a defendant's right to meaningful representation in a criminal proceeding. In short, a prosecutor may limit the counsel available to the defendant and constrain the attorney's ability to act on the defendant's behalf merely by indicating an intent to seek forfeiture of any fees paid, even though the prosecutor may have no grounds to suggest that fees will be subject to forfeiture. Because of the potential adverse effect on the defendant's ability to retain adequate representation, this note argues that the forfeiture provisions of RICO as applied to attorneys' fees are unconstitutional.

Scope of the Sixth Amendment: Right to Counsel Versus Right to Counsel of One's Choice

Before analyzing the constitutional claims in attorneys' fee forfeiture cases, it is necessary to examine the sixth amendment jurisprudence on which these claims are based. The sixth amendment guarantees the accused the right to representation by counsel "in all criminal prosecutions."15 In 1963 the Supreme Court recognized the criminally accused's right to assistance of counsel for his defense.16 The right to counsel is absolute in the sense that it cannot be denied without violating the fundamental principles of liberty and justice.17 The courts have yet to uniformly define the degree of autonomy the sixth amendment guarantees the accused in the selection of privately retained counsel.

The Supreme Court, however, has qualifiedly recognized the sixth amendment's guarantee to a criminal defendant of representation by counsel of his own choice. In Powell v. Alabama,18 the Court observed that "it is hardly necessary to say that, the right to counsel being conceded, a defendant

14. Id. at 1347. The statute is not designed to set aside legitimate transfers for value. The legislative history notes that "the provision should be construed to deny relief [only] to third parties acting as nominees of the defendant or who have knowingly engaged in sham or fraudulent transactions." Id.

See S. Rep. No. 225, 98th Cong., 2d Sess. 193, 208 (1984). In analyzing subsection (m), the Senate Report provides that "an order of forfeiture may reach only property of the defendant, save in those instances where a transfer to a third party is voidable." Id.

15. U.S. CONST. amend. VI.


17. Id. at 343. See also Johnson v. Zerbst, 304 U.S. 458, 463 (1938) ("That which is simple, orderly and necessary to the lawyer, to the untrained layman may appear intricate, complex and mysterious.").

18. 287 U.S. 45 (1932).
should be afforded a fair opportunity to secure counsel of his own choice.\textsuperscript{19} Federal courts consistently cite the Powell decision for the proposition that the right to counsel of one's own choice is an implicit sixth amendment guarantee.\textsuperscript{10}

Lower federal courts, like the Supreme Court, are committed to the sixth amendment's guarantee of the right to counsel of one's own choosing. However, all of the federal circuit courts have limited this constitutional guarantee. In United States v. James\textsuperscript{21} and United States v. Phillips,\textsuperscript{22} the Second and Sixth circuits, respectively, held that although the right of a criminal defendant to representation of his choice is a right of constitutional dimension, it is not an absolute guarantee.\textsuperscript{23} Likewise, the Sixth Circuit has stated that the right to counsel of choice must be carefully balanced against the public's interest in the orderly administration of justice.\textsuperscript{24}

The interest in providing the defendant a fair opportunity to defend himself at trial seems stronger than the interest in preserving an attorney-client relationship based on mutual trust. Thus, although a criminal defendant's right to retain counsel is virtually unlimited, his right to counsel of choice is qualified.\textsuperscript{25}

Courts may deny a defendant a continuance, for example, even though the denial effectively prevents him from being represented by the counsel of his choice. A defendant may request additional time to secure a lawyer's services because he has failed to secure counsel at all,\textsuperscript{26} because counsel has

\textsuperscript{19} Id. at 53. The Powell Court's reference to counsel of choice must be read within its factual context. The defendants convicted in Powell were charged with a capital offense but were afforded neither the time nor the opportunity to retain counsel on their own. Instead, the trial court haphazardly "appointed all the members of the bar" to represent them at the arraignment, with the expectation that some would continue to assist the accused at trial. Id. at 56.


\textsuperscript{21} 708 F.2d 40 (2d Cir. 1983).

\textsuperscript{22} 699 F.2d 798 (6th Cir. 1983).

\textsuperscript{23} See generally United States v. Curcio, 680 F.2d 881, 884, 890 (2d Cir. 1982); United States v. Cunningham, 672 F.2d 1064, 1070 (2d Cir. 1982); cert. denied, 466 U.S. 951 (1984); Gandy v. Alabama, 569 F.2d 1318, 1323-25 (5th Cir. 1978); United States v. Vargas-Martinez, 569 F.2d 1102, 1104 (9th Cir. 1978); United States v. Dinitz, 538 F.2d 1214, 1219-22 (5th Cir. 1976), cert. denied, 429 U.S. 1104 (1977).

\textsuperscript{24} Linton v. Perini, 655 F.2d 207, 209-12 (6th Cir. 1981), cert. denied, 454 U.S. 1162 (1982) (recognizing the qualified right to counsel of choice that must be carefully balanced against the public's interest in the orderly administration of justice).

\textsuperscript{25} See Morris v. Slappy, 461 U.S. 1, 10-12 (1983) (a state trial court did not violate a defendant's sixth amendment right to counsel by denying defendant's motion for continuance until the deputy public defender initially assigned to defend him was available). See also United States v. Ostler, 597 F.2d 337, 341 (2d Cir. 1979); United States v. Gray, 565 F.2d 881, 887 (5th Cir.), cert. denied, 435 U.S. 955 (1978); United States v. Poulack, 556 F.2d 83, 86 (1st Cir.), cert. denied, 434 U.S. 986 (1977).

\textsuperscript{26} See, e.g., United States v. Leavitt, 608 F.2d 1290, 1294 (9th Cir. 1979) (per curiam).
withdrawn, or because he has become dissatisfied with counsel and desires to be represented by someone else. Even if he has secured satisfactory counsel, a defendant may seek a continuance because counsel needs additional time to prepare for trial or is unable to be present on the date due to scheduling conflicts or illness.

Unlike the qualified right of counsel of choice for paying defendants, courts generally do not recognize any right to appointed counsel of choice for indigent defendants. Thus, RICO defendants who have become indigent

(denial of second continuance after defendant failed to show good cause for delay in retaining counsel during previous months).

27. See, e.g., United States v. Burton, 584 F.2d 485, 489 (D.C. Cir. 1978), cert. denied, 439 U.S. 1069 (1979) (one of the two defense attorneys representing defendant withdrew on date of trial); Lee v. United States, 235 F.2d 219, 220 (D.C. Cir. 1956) (counsel withdrew on eve of trial with leave of court).

28. See, e.g., Urguhart v. Lockhart, 726 F.2d 1316, 1319 (8th Cir. 1984) (defendant represented by appointed counsel requested continuance on day of trial in order to retain private counsel); United States v. Sexton, 473 F.2d 512, 513 (5th Cir. 1973) (defendant who had ample time to employ counsel sought continuance to discharge court-appointed counsel and retain private counsel); United States v. Pigford, 461 F.2d 648, 649 (4th Cir. 1972) (defendant sought continuance to change private counsel); United States v. Hampton, 457 F.2d 299, 301 (7th Cir.), cert. denied, 409 U.S. 856 (1972) (indigent defendant requested time to discharge court-appointed counsel and retain different counsel with newly available family funds); United States v. Hollis, 450 F.2d 1207, 1208 (5th Cir. 1971) (court-appointed counsel sought discharge so defendant could retain counsel).

29. See, e.g., Morris v. Slappy, 461 U.S. 1, 5-6 (1983) (original counsel required surgery; substitute counsel appointed six days before trial claimed to be ready but defendant argued additional preparation time was needed); United States v. LaMonte, 684 F.2d 672, 673-74 (10th Cir. 1982) (substitute counsel sought delay to prepare where defendant dismissed original counsel four days before trial); Linton v. Perini, 656 F.2d 207, 207-08 (6th Cir. 1981), cert. denied, 454 U.S. 1162 (1982) (new attorney objected to going to trial only ten days after appointment as counsel).

30. See, e.g., United States v. Cicale, 691 F.2d 95, 106 (2d Cir. 1982), cert. denied, 460 U.S. 1082 (1983) (counsel had two trials scheduled the same day); Gandy v. Alabama, 569 F.2d 1318, 1320 (5th Cir. 1978) (same); United States v. Poulick, 556 F.2d 83, 85 (1st Cir.), cert. denied, 434 U.S. 986 (1977) (attorney's schedule conflict would require several weeks of delay); United States v. Inman, 483 F.2d 738, 739-40 (4th Cir. 1973), cert. denied, 416 U.S. 988 (1974) (counsel had two trials scheduled for same day).

31. See, e.g., Gracalone v. Lucas, 445 F.2d 1238, 1241-42 (6th Cir. 1971), cert. denied, 405 U.S. 922 (1972) (attorney hospitalized); Reloford v. United States, 288 F.2d 298, 299-300 (9th Cir. 1961) (same).

32. See, e.g., United States v. Calabro, 467 F.2d 973, 986 (2d Cir. 1972), cert. denied, 410 U.S. 926 (1973) (defendant has no absolute right to reject assigned counsel and demand another after trial has begun); United States v. Morrissey, 461 F.2d 666, 669-70 (2d Cir. 1972) (denial of defendant's request for new appointed counsel does not deprive him of constitutional rights where reasons for change were insubstantial); Bowman v. United States, 409 F.2d 225, 226-27 (5th Cir. 1969), cert. denied, 398 U.S. 967 (1970) (denial of defendant's request for continuance to obtain counsel of his own choosing, on day of trial, was proper because "requests for appointment of a new attorney on the eve of trial should not become a vehicle for achieving delay") (quoting United States v. Llanes, 374 F.2d 712, 717 (2d Cir.), cert. denied, 388 U.S. 917 (1967)). See generally Tague, An Indigent's Right to the Attorney of His Choice, 27 Stan. L. Rev. 73 (1974) (suggesting a larger role for defendants in selecting appointed counsel).

If, however, the defendant seeks to discharge appointed counsel and to have new counsel ap-
when the government restrains all their assets until a conviction is final have no right to choice of counsel. Rather, these indigents must rely on counsel appointed or obtained through public defenders' offices.

Not only does an accused have a qualified right to counsel of his choice, he has an absolute right to effective assistance of counsel. Speaking recently for the United States Supreme Court in *Strickland v. Washington*, Justice O'Connor remarked that the purpose of the right to effective counsel is "to ensure [that criminal defendants] receive a fair trial." In some cases the performance of counsel may be so inadequate that, in effect, no assistance of counsel is provided. The Court stated that the function of counsel in representing a criminal defendant is to assist the defendant; and hence, counsel owes his client a duty of loyalty, a duty to avoid conflicts of interest. The government violates this right to effective assistance of counsel when it interferes with the ability of counsel to make independent decisions about how to conduct the defense.

Thus, it is crucial to analyze the sixth amendment’s guarantee of effective assistance of counsel in the context of RICO's forfeiture provisions. The critical issue focuses on a potential violation of the sixth amendment’s right to effective counsel when the defendant’s assets are restrained by court order, requiring a court-appointed attorney. The issue is clearly one of constitutional dimensions: Does the application of the RICO forfeiture provisions to assets transferred in exchange for bona fide legal services impermissibly interfere with the sixth amendment right to counsel?

**Impact of Forfeiture of Attorney’s Fees on the Right to Effective Counsel and the Qualified Right to Counsel of Choice**

Under the 1984 Comprehensive Forfeiture Act, the government may indicate its intention to require forfeiture of attorneys’ fees directly by including in an indictment a request for forfeiture of all the defendant’s assets, or by motion for a pretrial restraining order covering the defendant’s assets, including those set aside to pay fees. The scant legislative history of the Act is silent with respect to attorneys’ fees. Thus, with the blessing of Congress,

pointed, a court must appoint substitute counsel upon a good faith showing of "good cause, such as a conflict of interest, a complete breakdown of communication or an irreconcilable conflict." McKee v. Harris, 649 F.2d 927, 931 (2d Cir. 1981) (quoting United States v. Calabro, 467 F.2d at 986), cert. denied, 456 U.S. 917 (1982). See also Brown v. Craven, 424 F.2d 1166, 1169-70 (9th Cir. 1970) (court's denial of early motions for substitute appointed counsel and failure to inquire into reasons for defendant's dissatisfaction denied defendant's right to effective assistance of counsel where spite between them dissuaded defendant from cooperating or communicating with counsel).


34. *Id.* at 688.

35. See 18 U.S.C. § 1963 (Supp. III 1985). See also Stone, *supra* note 11, at 544. While the restraining order prevents transfer or dispersion of the assets, the government subsequently might include a forfeiture of fees provision in the indictment after acquiring further information. *Id.*

36. The term "fees" does not appear in the statute. See S. REP. No. 617, 91st Cong., 1st
federal prosecutors are able to make sweeping attacks on criminal organizations. For some prosecutors, this entails scrutiny of lawyer activity, including efforts to forfeit attorneys’ fees.37 Prosecutors justify these efforts based on the language of the 1984 Act establishing the government’s interest in forfeited assets “at the time the offense is committed.”38

Regardless of the statutory language of RICO’s forfeiture provisions, one must consider the impact of the forfeiture of attorneys’ fees on defendants and third party attorneys.39 The forfeiture of attorneys’ fees under RICO

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Sess. 79 (1969). An earlier draft of a similar forfeiture statute, stating that “nothing in this section is intended to interfere with a person’s Sixth Amendment right to counsel,” by itself would not appear to resolve the issue of attorney’s fees. See also United States v. Rogers, 602 F. Supp. 1332, 1347 (D. Colo. 1985) (suggesting that the language is persuasive).

37. Stone, supra note 11, at 561.

38. See supra note 5. The language in the RICO statute is similar to CFA. The property of the defendant may be the subject of forfeiture unless the transferee establishes in a hearing that he is a bona fide purchaser for value who “at the time of purchase” was reasonably without cause to believe property was subject to forfeiture. 18 U.S.C. § 1963(g) (Supp. III 1985).

39. Although the legislative history and a literal reading of the RICO statute appear to warrant forfeiture of attorney’s fees, the impact of this forfeiture may be constitutionally, as well as economically, devastating. A RICO forfeiture may: (1) dissolve a defendant’s entire business and thereby destroy a substantial portion of his livelihood; (2) extinguish or severely impair third party interest in the same property; and (3) cut short alienability and enjoyment of all potentially forfeitable property before trial to the economic detriment of both defendant and third party. See Reed & Gill, supra note 2, at 71. See also United States v. L’Hoste, 615 F.2d 383, 384-85 (5th Cir. 1980); United States v. Veon, 549 F. Supp. 274, 280 (E.D. Cal. 1982).

The primary argument raised by RICO defendants is that the issuance of a restraining order impermissibly interferes with their ability to retain private counsel of choice. To the extent that restraining orders entirely deprive defendants of the means to hire attorneys, defendants are entitled to court-appointed counsel. Thus, it is necessary to decide whether the availability of appointed counsel satisfies the sixth amendment when a restraining order makes a nonindigent defendant financially unable to retain private counsel. Simply stated, the question is whether court-appointed public defenders are effective substitutes for members of private defense firms to represent a defendant charged with a complex RICO violation.

The expertise of public defenders echoes a self-serving suggestion forwarded by members of the criminal defense bar that an elite cadre of lawyers are uniquely qualified to represent defendants in complex criminal litigation such as RICO. Several noted authorities recognize the devastating effect that representation by court-appointed counsel will have on a RICO defendant’s constitutional guarantees. RICO prosecutions involve extremely complex and prolonged trials that can only be handled by a small number of lawyers nationally. By allowing the government to restrain a defendant's assets with such a low standard of persuasion, the government seeks to disqualify the best-qualified lawyers, and their firms may be the only available firms practicing in the relevant field of law.

In stark contrast, the court in Rogers emphatically rejected the appointed-counsel solution. According to Rogers, the appointed-counsel solution pays no more than lip service to the constitutional guarantee because it ignores the exigencies of RICO cases, which include the vast resources or expertise of the average federal public defender’s office, the significant resources the government devotes to RICO prosecutions, the complexity of issues in RICO cases, and the length of time a RICO investigation may consume.

Rogers, 602 F. Supp. at 1349. If attorneys’ fees are subject to forfeiture after conviction only upon showing of probable cause, in the view of the Rogers’ court, no member of the private bar would represent RICO defendants and no public defender or appointed counsel could do so effectively.
must be consistent with the fair trial principles implicit in the fifth and sixth amendments in order to be constitutionally valid.

**Prosecutorial Misconduct**

Prosecutorial discretion in subjecting a criminal defendant's assets to forfeiture\(^\text{40}\) has a serious impact on the sixth amendment's guarantee of the right to effective assistance of counsel of one's choice.\(^\text{41}\) More specifically, applying the RICO statute to attorneys' fees permits the federal prosecutor to select defense counsel of the government's choice, or at least to restrict significantly the pool of available defense counsel. Simply stated, the government can limit the willingness of attorneys to defend RICO defendants by liberally naming all of defendant's assets in the indictment, leaving the defendant with no financial means to retain counsel. Consequently, the courts must appoint a public defender to represent the accused. As the ABA pointed out in its Recommendation on Forfeiture in July 1985, there appears to be some truth to the claim that in permitting the government to pursue forfeiture of attorneys' fees, "the right to counsel will be empty because it will depend on what the government is willing to provide for a particular defendant."\(^\text{42}\)

The prosecutors, on the other hand, claim that the objective of RICO's new forfeiture provision is to provide a means for the government to confiscate the ill-gotten gains of criminal enterprise and to prevent the illegal transfer of those gains to third parties.\(^\text{43}\) It would be naive to presume that lawyers can be nothing other than innocent third parties and, as a result, should be excluded from the reach of the forfeiture law. Thus, the government claims it is entirely consistent with the purpose and language of the forfeiture laws for the government to pursue forfeiture of attorneys' fees that are paid with the proceeds of crime.\(^\text{44}\)

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41. The role of the defense counsel is completely ignored when the government abuses the purposes of the forfeiture statute and maneuvers to "choose" defense counsel for the accused. The *Rogers* court recognized this abuse of an accused's sixth amendment guarantee when it stated that the "government would possess the ultimate tactical advantage 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." See Stone, supra note 11, at 568 (quoting Rogers, 602 F. Supp. at 1349).

42. Recommendation on Forfeiture, 1985 ABA CRIM. JUST. REP. 3 (approved by ABA policy, July 1985).

43. Stone, supra note 11, at 568.

44. Id. This view may be unrealistic if courts follow the reasoning of pre-1984 Act decisions.
The crucial point when considering prosecutorial discretion is that the prosecutor can use the threat of forfeiture of fees to reduce the pool of counsel available to the defendant. In United States v. Badalamenti,44 the court recognized the impact of prosecutorial misconduct on the sixth amendment guarantees. In the court’s view, “the problem is the unlikelihood of obtaining a lawyer at all if the lawyer will incur forfeiture of his fees upon the client’s conviction.”46 As the court noted, it is irrelevant that forfeiture will be denied if the defendant’s money is clean.

The sixth amendment’s qualified right to effective counsel of choice belongs to guilty defendants as well as innocent ones. In Badalamenti the court summarized the problems inherent in the prosecutorial discretion used in forfeiture cases. No one is more aware of the likelihood that the money may come from such prohibited activity than the lawyer who is asked to represent the defendant. The court stated:

If the statute applies to him, its message to him is “Do not represent this defendant or you will lose your fee.” That being the kind of message lawyers are likely to take seriously, the defendant will find it difficult or impossible to secure representation. By the Sixth Amendment we guarantee the defendant the right of counsel, but by the forfeiture provision of . . . RICO . . . we insure that no lawyer will accept the business.47

Conflicts of Interest

RICO defendants are the first to argue that ethical problems lurk on the periphery of the right to counsel argument. Simply stated, the attorney may be more interested in saving his fees from RICO forfeiture than providing the best defense for the accused, as required by the sixth amendment’s guarantee of effective counsel. As previously mentioned, the court in Strickland defined “effective” assistance of counsel to include some very basic duties.48 The duty to advocate the defendant’s cause is derived from counsel’s function as assistant to the defendant. The more particular duties to consult with the

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46. Id. at 197-98.
47. Id. at 196.
defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution are also derived from this duty. Counsel must bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process.\textsuperscript{49}

RICO defendants urge that an attorney whose fee may be subject to forfeiture has an inevitable conflict of interest because he may be forced to choose between litigation strategy likely to preserve his fee and a strategy likely to result in forfeiture but which will keep his client out of prison.\textsuperscript{50} For example, an attorney who desires to avoid forfeiture of his fee might recommend that his client plead guilty to a lesser offense not punishable by forfeiture when a wiser course for the client would be to stand trial on the original charges.\textsuperscript{51} Contrary to the \textit{Strickland} standard, an attorney might be tempted to reject a plea bargain that includes forfeiture of tainted assets, even though going to trial would increase the client’s risk of a lengthy prison term.\textsuperscript{52} In either event, the lawyer would be breaching his duty to give independent and disinterested advice to his client.

Case law clearly recognizes the denial of the defendant’s constitutional rights when an attorney refuses to continue defending a client who cannot supply him with money.\textsuperscript{53} The attorney is duty bound to represent the client to the best of his ability. However, the conflict arises because representing a criminal defendant to the best of one’s ability may be substantially affected where there is no corresponding economic motive. The attorney who is receiving an adequate compensation is much more likely to provide effective assistance of counsel than will an attorney whose fees are subject to forfeiture to the government. This conflict of interest, between remaining loyal to a client by effective representation and concentrating efforts on securing attorneys’ fees, will inherently arise regardless of the professional ethics that impose a duty of loyalty on attorney. In \textit{Badalamenti} the court noted that:

\begin{quote}
A lawyer who was so foolish, ignorant, beholden or idealistic as to take the business would find himself in inevitable positions of conflict. His obligation to be well informed on the subject of his
\end{quote}

\textsuperscript{49} Id. at 685.
\textsuperscript{50} See Brickey, \textit{supra} note 20, at 534.
\textsuperscript{52} \textit{Tanniello}, No. S 85 Cr. 115 at 14 (citing \textit{MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-103(A); EC 5-1, 2, 3, 7 (1979)}. \textit{See also} Maxwell v. Superior Court, 101 Cal. App. 3d 736, 161 Cal. Rptr. 849 (1980) (fee arrangement assigning to attorney dramatic rights to defendant’s story and waiving attorney-client privilege violates duty to give disinterested counsel), vacated, 30 Cal. App. 3d 606, 180 Cal. Rptr. 177 (1982).

There is another dimension to the lawyer’s conflict problem. If the government intends to seek forfeiture of fees paid to whomever represents the defendant, the defendant’s right to conflict-free counsel will be compromised.

client’s case would conflict with his interest in not learning the facts that would endanger his fee. . . . The statute would give attorneys a motive to negotiate a guilty plea that did not involve forfeiture, rather than fight the case expending valuable time and increasing the risk of incurring forfeiture.  

Attorney-Client Confidences

A defendant’s right to a fair trial is jeopardized when the threat of forfeiture of fees manufactures conflicts of interest and impairs the attorney’s ability to be a partisan advocate. Such a result implicates the attorney-client privilege and endangers the attorney’s ability to fulfill the duty of loyalty owed to the client under the Constitution. To the extent that the forfeiture provisions in RICO and the CFA permit the government to create this conflict by pursuing forfeiture of attorney’s fees, the statute is unconstitutional as applied.

The defense attorneys’ arguments concerning a breach of the attorney-client privilege are grounded in the sixth amendment’s guarantee of effective assistance of counsel. Simply stated, although fee information is not generally protected by the attorney-client privilege, the lawyer may fear that he will have to testify about his knowledge of the defendant’s financial affairs and possibly compromise privileged communications. This fear of disclosure has the effect of chilling communications between attorney and client, thereby encroaching on the right to counsel. As Judge Kane opined in Rogers, “the threat of an attorney having to disclose information obtained from his client will chill the openness of those communications, thereby impinging on the right to counsel.”

In defining the limits of the attorney-client privilege, courts have held that client identity and fee information, although incriminating, generally are not confidential communications and, therefore, cannot be privileged communications. However, even a cursory glance at the forfeiture language in RICO reveals that an attorney will have to disclose more than the mere identity of his client and their fee arrangement. The RICO forfeiture provision provides:

Any property that is subsequently transferred to a person other than the defendant may be the subject of a special verdict of

55. Stone, supra note 11, at 570.
57. See, e.g., In re Shargel, 742 F.2d 61 (2d Cir. 1984) (fee information only encompasses communications necessary to obtain informed legal advice); In re Witness Before Special Grand Jury, 729 F.2d 489 (7th Cir. 1984) (fee information privileged only if so much is already known that its disclosure would reveal a confidential communication); In re Osterhoudt, 722 F.2d 591 (9th Cir. 1983) (disclosure of amount of fees not privileged); Payden v. United States, 605 F. Supp. 839 (S.D.N.Y. 1985), rev’d on other grounds, 767 F.2d 26 (2d Cir. 1985) (mere disclosure of fee information by defense counsel that is adverse to defendant does not affect counsel’s ability to represent defendant effectively).
forfeiture unless the transferee establishes in a hearing pursuant to subsection (m) that he is a bona fide purchaser for value of property who at the time of the purchase was reasonably without cause to believe the property was subject to forfeiture.\textsuperscript{58}

The information sought for disclosure under section 1963 to prevent forfeiture of a third party's property clearly goes beyond disclosure concerning mere fee arrangements. The attorney, in some circumstances, may be forced to disclose all financial information revealed by his client in order to prove that he is a bona fide purchaser for value and, therefore, avoid forfeiture.

The language under section 1963(c) and (m) requires that a third party transferee establish in a hearing that he received defendant's assets without knowledge and in good faith belief that the assets were not illegally obtained. An attorney must come forward with information revealed to him by his client to show that he did not have actual notice that his fees were obtained by the illegal actions. Thus, it may be virtually impossible for an attorney to present information that ensures a right to a professional fee without revealing privileged communication. If nothing else, ongoing breaches of the attorney-client privilege, arising solely by operation of a statutory scheme, provide support for the view that the procedure is inconsistent with partisan advocacy.\textsuperscript{59}

The underlying rationale for the attorney-client privilege is that "encouraging clients to make the fullest disclosure to their attorneys enables the latter to act more efficiently, justly, and expeditiously."\textsuperscript{60} In order for the sixth amendment guarantees to be upheld, the court in \textit{Payden v. United States}\textsuperscript{61} noted that there must be a full and frank discussion between defense counsel and defendant.\textsuperscript{62} In \textit{In re Shargel}, the court recognized the chilling effect that the forfeiture provisions will have on the attorney-client privilege:

The attorney must thus decide early in the course of consultation whether to warn the client against communication which, however necessary to the rendering of competent legal advice, might be disclosed to an adversary in litigation. . . . Inadequate legal counsel would fall upon the innocent as well as the guilty and would in the long run impair the ability of courts to administer justice fairly.\textsuperscript{63}

\begin{itemize}
  \item\textsuperscript{58} 18 U.S.C. § 1963(c) (Supp. III 1985).
  \item\textsuperscript{59} See Stone, \textit{supra} note 11, at 573.
  \item\textsuperscript{60} \textit{Id.} See also J. \textit{Weinstein} & M. \textit{Berger}, \textit{EVIDENCE} § 503(02) (1985); \textit{Fisher v. United States}, 425 U.S. 391, 403 (1976) (for fully informed legal advice, client must confide in attorney); \textit{Hunt v. Blackburn}, 128 U.S. 464, 470 (1888) (interest of justice requires client to utilize attorney's service without fear of subsequent disclosure).
  \item\textsuperscript{61} 605 F. Supp. 839 (S.D.N.Y. 1985), rev'd on other grounds, 767 F.2d 26 (2d Cir. 1985).
  \item\textsuperscript{62} \textit{Id.} at 847.
  \item\textsuperscript{63} \textit{In re Shargel}, 742 F.2d 61, 63 (2d Cir. 1984).
\end{itemize}
The court further notes that consultation and the payment of a fee may be preconditions to seeking legal advice. Logically, then, the lack of a privilege against disclosure in an attorney-client relationship may discourage some persons from seeking legal advice at all.64

Judge Level in *Badalamenti* described the dilemma encountered by the defense counsel: "His 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."65 More broadly, it can be argued that the sense of trust and confidence in a relationship between an attorney and client is significantly impaired by the prospect that an attorney may become a witness against the client in the pending prosecution. Thus, regardless of the general rule that fee information is not protected by the attorney-client privilege, it is the chilling effect on the attorney's and the client's communication that has a serious impact on the defendant's sixth amendment rights.

**Objections Raised by the ABA**

Although nothing on the face of RICO or the CFA excepts attorneys' fees from criminal forfeiture, the American Bar Association strongly objects to the new forfeiture laws as unconstitutional and "draconian."66 The objections listed in a recent ABA Section Report typify the response of the defense bar to forfeiture of attorneys' fees:

1. It denies an accused the right, under the Sixth Amendment, to retain counsel of his or her choice;
2. It impedes the ability of such retained counsel to render effective assistance;
3. It impairs the relationship of confidence and confidentiality between an accused and his or her counsel;
4. It allows the government to manipulate the roster of counsel, or to disqualify counsel by seeking to compel testimony by the lawyer against the client;
5. It discourages or disallows competent attorneys from agree-

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64. *Id.* This chilling effect extends beyond the scope of attorney-client conversations. The conflict fostered by the statute may cause the attorney to be less than a zealous advocate of his client's interests in order to preserve the right to fees, thereby intentionally limiting communications with the client. How can defense counsel zealously defend against a RICO violation while taking care to remain partially ignorant of the defendant's financial background in order to protect the right to attorneys' fees? Such a balancing act suggests that the attorney and client have adverse interests. See Stone, *supra* note 11, at 573.


ing to represent clients in criminal cases which involve allegations of forfeiture; and

6. It diverts the efforts and energies of attorneys from the preparation of the defense of an accused by requiring them to litigate issues related to their attorney-client relationship. 67

In sum, two basic objections exist. First, when the government requests forfeiture of attorneys' fees, it has impaired constitutional protections because the defendant might not be able to retain counsel of choice or effective counsel. Second, in order to obtain fees for services rendered, the attorney must assert a claim in a post-trial, third party hearing that may amount to a disclosure of confidential attorney-client communications. 68

This attack by the ABA on the statute voices objections to the forfeiture of attorneys' fees in constitutional dimensions. The statute is unconstitutional as applied because it fails to afford defendants in a criminal case the right to effective counsel guaranteed by the Constitution.

Interpretation of RICO's Forfeiture Provisions to Avoid Constitutional Violations

Considering the risks of depriving a defendant of the right to effective assistance of counsel and the right to a fair trial, the benefit of additional procedural safeguards could prove to be invaluable. To dispel the concerns about the constitutional deficiencies inherent in RICO, the Justice Department issued guidelines for prosecutors seeking criminal forfeiture. 69

The guidelines require that specific threshold criteria be met before United States attorneys may pursue assets transferred as attorneys' fees and require high-level Justice Department review of every decision to seek forfeiture of attorneys' fees. 70 Since the guidelines do not establish any independent rights on the part of the defendant to the procedures set forth, the failure of prosecutors to follow the guidelines will leave the defendant without a basis for complaint. 71

The Justice Department's guidelines merely attempt to restore constitutional safeguards to cases involving the forfeiture of a defendant's assets. Thus, the guidelines should be recognized as constitutional mandates and not procedures within the discretion of the Attorney General.

Although the Justice Department rejects any distinction between legitimate and sham transactions as a basis for determining whether fees are subject to forfeiture, 72 the guidelines treat the two cases differently. If there are reasonable grounds to believe the transfer is a fraudulent transaction designed to shield otherwise forfeitable assets from statutory forfeiture, the

67. See ABA CRIM. JUST. REP., supra note 42. See also Stone, supra note 11, at 545.
68. See supra note 67.
70. Id.
71. Id. § 9-111.300.
guidelines permit pursuit of those assets without additional proof.\textsuperscript{73} Significantly, reasonable cause to believe the transaction is a sham may not be based solely on the transfer of a forfeitable asset to an attorney as a legal fee. Instead, some evidence of a scheme to ensure the client's continued access to the beneficial use of the asset and to defeat the government's ability to forfeit the property must be present.\textsuperscript{74}

On the other hand, if the assets have been transferred to an attorney as legitimate payment for legal representation in a criminal matter, the government cannot pursue forfeiture unless it has reasonable grounds to believe that the attorney had actual knowledge\textsuperscript{75} of the forfeitability of the particular asset\textsuperscript{76} at the time of the transfer. The guidelines contemplate that knowledge of the government's claim may be established in essentially three ways: (1) proof of knowledge that the particular asset is the subject of a civil forfeiture proceeding; (2) knowledge that the particular asset is subject to a preindictment or preconviction restraining order in connection with a criminal prosecution; or (3) knowledge that the particular asset is the subject of a forfeiture allegation in a criminal indictment.\textsuperscript{77}

The government may rely upon a defendant's trial testimony, voluntary disclosure of communications with his attorney, and other uncompelled disclosures of confidential communications to establish the attorney's knowledge of the client's livelihood when determining whether it is reasonable to believe the attorney knew the asset was derived from criminal misconduct.\textsuperscript{78} Although the government may employ several means to determine the attorney's knowledge of potential forfeitability, the government may not establish knowledge through compelled disclosure of confidential communications made by the client during representation. Adherence to the Justice Department guidelines should reduce the number of forfeiture cases in which conflicts of interest arise. When the guidelines have been implemented, the government must identify with particularity which assets are forfeitable before they are transferred as a legal fee. Therefore, the attorney will know at the outset whether the assets accepted as a fee are subject to forfeiture.

A second method of combatting the concerns of third party attorneys and RICO defendants has been suggested in the Justice Department guidelines. This method involves a pretrial hearing that increases the government's burden in forfeiture cases. Whether held before or after issuance of the ex parte restraining order, the purpose of the pretrial hearing is the same: to force the government to proffer evidence supporting pretrial restrictions on the use and alienability of property. The government must introduce evidence

\begin{itemize}
  \item \textsuperscript{73} Id. § 9-111.410.
  \item \textsuperscript{74} Id.
  \item \textsuperscript{75} Id. § 9-111.430.
  \item \textsuperscript{76} Id. § 9-111.570.
  \item \textsuperscript{77} Id. § 9-111.511.
  \item \textsuperscript{78} Id. § 9-111.512.
\end{itemize}
that (1) the defendant’s conviction is likely; (2) the assets listed in the indictment are subject to forfeiture upon conviction; and (3) absent a restraining order the defendant is likely to dissipate these assets.\[79\]

**Conclusion**

Criminal forfeiture is a sanction imposed to dispossess persons of property obtained through wrongdoing. Congress has declared criminal forfeiture statutes to be integral to the government’s battle against criminal racketeering on the theory that forfeiture of assets involved in crime disturbs the economic power base of criminal organizations.

According to some courts, a RICO forfeiture is not that severe, for it is limited to a defendant’s interest in the enterprise and takes effect only after criminal conviction.\[80\] To the contrary, a RICO forfeiture may destroy a substantial portion of a defendant’s livelihood and severely impair third party interests in the same property. A forfeiture with such far-reaching destructive implications must be carefully examined under the constitutional safeguards owed to criminal defendants.

Criminal forfeiture of attorney fees as an integral part of criminal litigations raises both practical and policy problems. On a policy level, the judicial system has an incentive to prevent erosion of the quality and availability of counsel through the creation of a financial disincentive to the practice of criminal litigation.\[81\] As a practical matter, the forfeiture of attorney fees will require adjudication of the source of attorney fees. As a part of the defendant’s criminal trial, proof of this financial source will raise difficult questions involving constitutional guarantees and privileges. Although the Justice Department guidelines do not resolve every concern about forfeiture of attorneys’ fees, they substantially reduce the number of potential ethical issues that impair the attorney’s role as an advocate.

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79. See Reed & Gill, *supra* note 2, at 84.