SMU | Dedman School of Law

SMU Law Review

Volume 39 | Issue 5 Article 6

January 1986

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Drew J. Fossum

CRIMINAL FORFEITURE AND THE ATTORNEY-CLIENT RELATIONSHIP: ARE ATTORNEYS' FEES UP FOR GRABS?

by Drew J. Fossum

AT the prompting of the law-and-order administration of Richard M. Nixon the Ninety-First Congress enacted new legislation to control organized crime.[1] Two of the most important statutes that Congress passed addressed racketeering[2] and drug trafficking.[3] The laws targeted familiar problems, but created a revolutionary new weapon in the battle against organized crime. Both the Racketeering Influenced and Corrupt Organizations Act (RICO)[4] and the Continuing Criminal Enterprise provisions of the Comprehensive Drug Abuse Prevention and Control Act (CCE)[5] pro-

1. SENATE COMM. ON THE JUDICIARY, ORGANIZED CRIME CONTROL ACT OF 1969, S. REP. NO. 617, 91st Cong., 1st Sess. 78-79 (1969). As part of a comprehensive effort to strengthen federal criminal law, President Nixon advocated new statutes that would attack the financial resources of criminals, realizing that "[a]s long as the property of organized crime remains, new leaders will step forward to take the place of those we jail." *Id.*; COMPTROLLER GENERAL, U.S. GENERAL ACCOUNTING OFFICE, ASSET FORFEITURE—A SELDOM USED TOOL IN COMBATTING DRUG TRAFFICKING 1 (1981) [hereinafter cited as COMPTROLLER GENERAL]; *see* Comment, *Criminal Forfeiture: Attacking the Economic Dimension of Organized Narcotics Trafficking*, 32 AM. U.L. REV. 227, 228-29 (1982).

2. Organized Crime Control Act of 1970, § 901(a) (Racketeer Influenced and Corrupt Organizations Act), Pub. L. No. 91-452, 84 Stat. 922 (codified as amended at 18 U.S.C. §§ 1961-1968 (1982)). RICO defines racketeering in terms of commission of any of a list of 24 federal and 8 state felonies, including: murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in narcotics and dangerous drugs, white slave trafficking, and 22 other felonies contained under the criminal laws of the United States. 18 U.S.C. § 1961(1) (1982); *see* H. MYERS & J. BRZOSTOWSKI, DRUG AGENTS' GUIDE TO FORFEITURE OF ASSETS 303 (1981). RICO forfeiture applies to persons involved in a pattern of racketeering activity or "at least two acts of racketeering . . . the last of which occurred within ten years . . . after the commission of a prior act of racketeering activity." 18 U.S.C. § 1961(5) (1982). The Act thus abandons the common law notion of crime as an isolated event and instead characterizes modern organized crime as more of a pattern of behavior than a series of individual acts. *See* Webb & Turow, *RICO Forfeiture in Practice: A Prosecutorial Perspective*, 52 U. CIN. L. REV. 404, 404-05 (1983).

3. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 408 (Continuing Criminal Enterprise), Pub. L. No. 91-513, 84 Stat. 1236 (codified as amended at 21 U.S.C. § 848 (1982)). CCE establishes that a person is guilty of engaging in a continuing criminal enterprise if: (1) he commits a felony that is enumerated in the statute; and (2) that felony "is part of a continuing series of violations" undertaken by that person in concert with five or more persons and "from which such person obtains substantial income or resources." *Id.*

4. 18 U.S.C. §§ 1961-1968 (1982).

5. 21 U.S.C. §§ 848 (1982).

vided for criminal forfeiture of convicted parties' property.[6] Since previous congressional attempts to control organized crime through fines and incarceration had repeatedly failed,[7] great hopes attached to the use of forfeiture to reduce significantly the economic base that gives criminal organizations their power.[8]

Application of RICO and CCE forfeiture provisions, however, did not achieve the lofty goals that Congress and many law enforcement officials had expressed.[9] In reaction to this legislative failure, Congress conducted hearings on ways to make the statutes more effective.[10] Congress then passed the Comprehensive Forfeiture Act of 1984,[11] which clarified many ambiguities of the original RICO and CCE forfeiture provisions and reflected congressional intent to broaden the scope of anti-organized crime legislation.[12]

The most controversial feature of the Comprehensive Forfeiture Act involves whether the expanded scope of RICO and CCE forfeiture may now reach attorneys' fees. In the 1984 Act Congress clearly indicated that both RICO and CCE extend to the proceeds of criminal enterprises and implied

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6. Criminal forfeiture authorizes confiscation of all of the defendant's property or financial resources that have some relation to his criminal activity. *See* Comment, *supra* note 1, at 229. The forfeiture provisions of RICO and CCE, which are similar in effect, contain only minor textual differences. Consequently, all references to one of the provisions also apply to the other unless otherwise noted. *See infra* notes 42-59 and accompanying text.

7. *See* SENATE COMM. ON GOVERNMENT OPERATIONS, PERMANENT SUBCOMM. ON INVESTIGATIONS, ORGANIZED CRIME AND ILLICIT TRAFFIC IN NARCOTICS, S. REP. NO. 72, 89th Cong., 1st Sess. 2 (1965); Comment, *supra* note 1, at 227-28. Early attempts at controlling narcotics failed in part because they primarily targeted possession and addiction rather than distribution and sale of drugs. *See* W. ELDRIDGE, NARCOTICS AND THE LAW 49-103 (2d ed. 1967) (empirical analysis of American narcotics legislation).

8. Advocates of criminal forfeiture explained that RICO and CCE provided a threefold attack on organized crime. Senator McClellan, one sponsor of RICO, stated that the statute "attacks the problem by providing a means of wholesale removal of organized crime from our organizations, prevention of their return, and, where possible, forfeiture of their ill-gotten gains." 116 CONG. REC. 591 (1970) (statement of Sen. McClellan); *see* Weiner, *Crime Must Not Pay: RICO Criminal Forfeiture in Perspective*, 1 N. ILL. U.L. REV. 225, 239-40 (1981).

9. A variety of sources describe the actual effect of RICO and CCE on organized crime as inconsequential. In the ten-year period following enactment of RICO and CCE federal prosecutors obtained only 97 indictments constituting actual and potential forfeitures of only two million dollars. COMPTROLLER GENERAL, *supra* note 1, at 49. The actual volume of the drug trade in this country, however, is enormous. In 1979 between $55 and $73 billion worth of illicit drugs changed hands in the United States. *See* Hughes & O'Connell, *In Personam (Criminal) Forfeiture and Federal Drug Felonies: An Expansion of a Harsh English Tradition into a Modern Dilemma*, 11 PEPPERDINE L. REV. 613, 615 (1984). In 1981 estimates placed the value of the domestic drug trade at $80 billion. Bensinger, *Blank Cartridges*, Wash. Post, Oct. 8, 1981, at A31, col. 2, *cited in* Comment, *supra* note 1, at 1.

10. *See DEA Oversight and Budget Authorization: Hearings Before the Subcomm. on Security and Terrorism of the Senate Comm. on the Judiciary*, 97th Cong., 2d Sess. 52 (1982); *Forfeiture of Narcotics Proceeds: Hearings Before the Subcomm. on Criminal Justice of the Senate Comm. on the Judiciary*, 96th Cong., 2d Sess. 1 (1980). For a detailed review of the events leading up to passage of the Comprehensive Forfeiture Act of 1984, see S. REP. NO. 225, 98th Cong., 2d Sess. 191, 191-92, *reprinted in* 1984 U.S. CODE CONG. & AD. NEWS 3182, 3374-80 [hereinafter cited as SENATE FORFEITURE REPORT].

11. *See* Comprehensive Forfeiture Act of 1984, Pub. L. No. 98-473, § 302, 98 Stat. 2040 (1984) (codified at 18 U.S.C.A. § 1963 (West Supp. 1985); 21 U.S.C.A. §§ 848-53 (West Supp. 1985)).

12. *See* SENATE FORFEITURE REPORT, *supra* note 10, at 191-92.

that no exceptions to either statute's forfeiture provision exist.[13] Consequently, prosecutors have begun to seek RICO and CCE indictments by alleging not only forfeitability of crime-related assets and criminal proceeds, but also forfeitability of attorneys' fees.[14] The criminal defense bar steadfastly opposes such an interpretation of the Comprehensive Forfeiture Act on two grounds. Defense attorneys claim that: (1) such an interpretation violates a defendant's constitutional right to counsel; and (2) allowing forfeiture of attorneys' fees jeopardizes the attorney-client privilege.[15]

The district courts that have considered the scope of the Comprehensive Forfeiture Act have reached differing results. The disagreement primarily involves: (1) whether prosecutors can apply RICO and CCE forfeiture to attorneys' fees; and (2) whether these laws subject attorneys' fee information to subpoenas.[16] The one appellate decision on the subject has failed to resolve the conflict between district court interpretations of RICO and CCE.[17]

In order to explain its value in the battle against organized crime, this Comment first examines the historical background of criminal forfeiture as well as modern statutory enactments of the common law doctrine. The discussion then focuses on the right to counsel and the attorney-client privilege as a preface for analysis and critique of the developing case law that interprets criminal forfeiture under RICO and CCE. A final section argues that courts have incorrectly interpreted RICO and CCE as providing an attorneys' fees exception to the scope of forfeitable property and suggests a resolution of the constitutional conflict surrounding the two statutes that preserves both the defendant's rights and the efficacy of criminal forfeiture.

I. THE LAW OF FORFEITURE

A. The Common Law Background of Criminal Forfeiture

Criminal forfeiture has become a new addition to the federal prosecutor's arsenal in the battle against organized crime, but the concept of forced forfeiture of assets antedates modern civilization. Forfeiture enhanced law enforcement efforts in Old Testament Israel[18] and in ancient Greece and

13. *See* 18 U.S.C.A. § 1963 (West Supp. 1985); 21 U.S.C.A. § 848 (West Supp. 1985).

14. *See, e.g.*, Payden v. United States, 605 F. Supp. 839, 849 n.14 (S.D.N.Y.), *rev'd on other grounds*, 767 F.2d 26 (2d Cir. 1985) (court interpreted CCE to encompass forfeiture of attorneys' fees although indictment alleged only general forfeiture); United States v. Rogers, 602 F. Supp. 1332, 1334-35 (D. Colo. 1985) (court found government's contention of forfeitability of attorneys' fees under RICO unsupported by legislative history).

15. Statement of Ronald I. Meshbesher, President, National Association of Criminal Defense Lawyers, to the Committee on Criminal Advocacy of the New York City Bar Association 3-5 (Mar. 20, 1985) [hereinafter cited as Statement of Meshbesher].

16. *See* Payden v. United States, 605 F. Supp. 839, 844-84 (S.D.N.Y.), *rev'd on other grounds*, 767 F.2d 26 (2d Cir. 1985); United States v. Rogers, 602 F. Supp. 1332, 1334-35 (D. Colo. 1985).

17. Payden v. United States, 767 F.2d 26, 29-30 (2d Cir. 1985).

18. Both commentators and courts have traced the concept of criminal forfeiture back to *Exodus* 21:28 and its requirement that "[i]f an ox gore a man or a woman, that they die: then the ox shall be surely stoned, and his flesh shall not be eaten; but the owner of the ox shall be quit." *Id.*; *see* Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 681 & n.17 (1974);

Rome.[19] The forfeiture device was extensively used in the common law of England[20] and, to a lesser extent, in colonial America.[21]

The early law of forfeiture evolved along two separate lines. First, courts applied forfeiture as an in personam[22] penalty pursuant to a finding of personal guilt, much like other in personam penalties.[23] Second, courts also utilized forfeiture as an in rem[24] penalty that was independent of personal guilt and based on the legal fiction that property that is used in a crime becomes evil or tainted.[25] In personam forfeiture provided the conceptual foundation for the modern law of criminal forfeiture; in rem forfeiture, on the other hand, became the modern doctrine of civil forfeiture.[26] With the exception of several comparative references, this Comment focuses exclusively on in personam or criminal forfeiture.

In contrast to in rem forfeiture,[27] in personam forfeiture did not last long in the young American republic. Discontent with the harsh, feudally based common law notions of estate forfeiture led to constitutional prohibition of both forfeiture of estate and the related doctrine of corruption of the blood as penalties for treason.[28] The first legislature extended the ban on in per-

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Comment, *Criminal Forfeiture and the Necessity for a Post-Seizure Hearing: Are CCE and RICO Rackets for the Government?*, 57 ST. JOHN'S L. REV. 776, 780 n.17 (1983).

19. Comment, *supra* note 18, at 780.

20. The English common law recognized at least three types of forfeiture. The first type applied to the property of convicted felons and required transfer of the felon's personal property to either the Crown or the felon's lord. The second type authorized forfeiture of specific property used in violation of a statute. The third, "deodand," required either the forfeiture of the property responsible for the death of another or payment of the assessed value of the piece of property. *See* 2 W. BLACKSTONE, COMMENTARIES *420-21; O.W. HOLMES, THE COMMON LAW 7-17 (1881). For discussions of early English forfeiture doctrines, see 3 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 371-88 (5th ed. 1942); Finkelstein, *The Goring Ox: Some Historical Perspectives on Deodands, Forfeitures, Wrongful Death and the Western Notion of Sovereignty*, 46 TEMP. L.Q. 169, 170-206 (1973). For a discussion of the modern English law of forfeiture, see Wasik, *The Hodgson Committee Report on the Profits of Crime and Their Recovery*, 1984 CRIM. L. REV. 708, 708-13, 717-20.

21. Weiner, *supra* note 8, at 231.

22. In personam forfeiture applies regardless of the property's involvement in the criminal act. *Id.* at 230.

23. Incarceration and death represent two common examples of in personam penalties applied against the person rather than against his property. *See* BLACK'S LAW DICTIONARY 711 (5th ed. 1979).

24. In rem actions name a res or thing as defendant and apply penalties directly to the property. *See, e.g.*, United States v. One 1971 Lincoln Continental Mark III, 460 F.2d 273, 274-75 (8th Cir. 1972) (when government seeks forfeiture of property, property owner in civil in rem action may move to suppress evidence).

25. *See* Comment, *supra* note 1, at 233.

26. *Id.*

27. In rem forfeiture enjoyed great popularity in the United States. Early judicial applications included forfeiture of ships and slaves. *See* United States v. Brig Malek Adhel, 43 U.S. (2 How.) 210, 237 (1844) (actions of captain and crew found to bind ship itself in an in rem forfeiture action); Act of July 31, 1789, ch. 5, § 12, 1 Stat. 29, 39. Subsequent applications have covered everything from airplanes to meat. *See* 19 U.S.C. § 1306 (1982) (tainted meat forfeitable); 49 U.S.C. § 782 (1982) (vehicles and aircraft forfeitable if used to smuggle contraband). In rem forfeiture remained the main tool for combatting organized crime until 1970. *See* Legislative Note, *Organized Crime Control Act of 1970*, 4 U. MICH. J.L. REF. 546, 624 (1971).

28. U.S. CONST. art. III, § 3, cl. 2 establishes that: "The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of

sonam forfeiture of estate and corruption of the blood to felony convictions as well.[29] The only congressional application of in personam forfeiture prior to 1970 was a confiscation act of 1862[30] that allowed the President to seize property estates of Confederate soldiers.[31]

In 1970 Congress revived in personam forfeiture in the United States by enacting criminal in personam forfeiture provisions in both RICO and CCE.[32] These statutory criminal forfeiture provisions, as originally enacted, differed from civil forfeiture in two major ways. The first difference involved the applicable burden of proof.[33] In criminal forfeiture actions the prosecution must prove the defendant's guilt beyond a reasonable doubt.[34] In civil forfeiture actions, as in all civil actions, the prosecution must meet the preponderance of the evidence standard.[35]

A second difference between statutory criminal forfeiture provisions and civil forfeiture involved the time at which forfeiture occurs. At common law and under the 1970 CCE and RICO forfeiture provisions, property was criminally forfeitable only upon conviction of the defendant.[36] The forfeiture did not relate back to the time of the crime and, as a result, any disposition of the property prior to actual conviction made forfeiture impossible.[37] Conversely, under civil forfeiture the forfeitable property becomes guilty or tainted from the time of its illegal use.[38] Thus, although the actual forfeiture proceeding takes place much later, the court deems the property to be

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Blood, or Forfeiture except during the Life of the Person attainted." The Constitution thus abolished the harsh English doctrines only for the specific offense of treason. One commentator has speculated that the American resentment toward the forfeiture of American property to the British Crown contributed to the colonial reluctance to utilize forfeiture. Weiner, *supra* note 7, at 225, 227. "Corruption of the blood," considered at least as offensive as forfeiture, prevented a convicted person from inheriting property, retaining property, or transferring property to an heir. *See id.* at 230-31.

29. Act of Apr. 30, 1790, ch. 9, § 24, 1 Stat. 112, 117 (codified as amended at 18 U.S.C. § 3563 (1982)). Many state constitutions also include bans on forfeiture of estate and corruption of the blood. *See* Hughes & O'Connell, *supra* note 9, at 613, 619.

30. Act of July 17, 1862, ch. 195, § 5, 12 Stat. 589, 590.

31. *Id.* The Supreme Court upheld the 1862 Act over constitutional and statutory challenges because its forfeiture provisions avoided reliance on either treason or other federal conviction. The Act thus did not conflict with the Constitution or with the 1790 forfeiture ban. *See* Miller v. United States, 78 U.S. (11 Wall.) 268, 304-14 (1870); Bigelow v. Forrest, 76 U.S. (9 Wall.) 339, 349-53 (1869).

32. 18 U.S.C. § 1963 (1982); 21 U.S.C. § 848(a) (1982).

33. *See* Comment, *supra* note 1, at 234.

34. *Id.*; *see* W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW 44-45 (1972); MCCORMICK ON EVIDENCE § 339 (E. Cleary ed., 3d ed. 1984).

35. *See* Clapper v. Lakin, 343 Mo. 710, 123 S.W.2d 27, 33 (1938) (burden of proof by preponderance of evidence rests upon party asserting affirmative of issue); McBaine, *Burden of Proof: Degrees of Belief*, 32 CALIF. L. REV. 242, 245 (1944). Texas in Amrani-Khaldi v. State, 575 S.W.2d 667 (Tex. Civ. App.—Corpus Christi 1978, no writ), and Oklahoma in OKLA. STAT. ANN. tit. 63, § 2-506(G) (West 1984) deviate from the preponderance of the evidence standard in civil forfeiture proceedings. In all other jurisdictions proof by preponderance of the evidence is adequate to establish forfeitability of property. *See* H. MYERS & J. BRZOSTOWSKI, *supra* note 2, at 15.

36. *See* Comment, *supra* note 1, at 234.

37. *See* 18 U.S.C. § 1963 (1982); 21 U.S.C. § 848 (1982).

38. *See* Comment, *supra* note 1, at 234.

divested from the owner as of the date of the crime.[39] A defendant who transfers property after the date of the crime transfers voidable title, and even good faith purchasers may lose title to property that the court finds subject to forfeiture.[40] Due to the different natures of the two forfeiture actions, acquittal of the defendant or failure to achieve criminal forfeiture does not bar a subsequent civil forfeiture action.[41]

B. RICO and CCE

The specific forfeiture provisions contained in section 1963 of RICO and section 848 of CCE target racketeers and drug traffickers, respectively.[42] RICO section 1963 authorizes forfeiture of any interest in an enterprise in violation of the substantive anti-racketeering provisions of the Act.[43] Under CCE forfeiture applies to a party who is convicted of engaging in a continuing criminal enterprise. The statute allows confiscation of the profits of such an enterprise as well as any interest affording influence over the enterprise.[44] The most significant difference between the forfeiture provisions of the two

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39. *Id.*

40. *Id.*

41. *See* M. GREEN, BASIC CIVIL PROCEDURE 201-07 (1972). Likewise, failure to achieve civil forfeiture does not bar a subsequent allegation of criminal forfeiture. *Id.* Neither dismissal of a criminal forfeiture proceeding nor acquittal of the defendant affects a subsequent civil forfeiture proceeding. Civil and criminal forfeiture, although sharing the same factual basis, are separate and independent actions. *See* H. MYERS & J. BRZOSTOWSKI, *supra* note 2, at 46.

42. *See* SENATE FORFEITURE REPORT, *supra* note 10, at 193.

43. 18 U.S.C. § 1963 (1982). RICO § 1963 provides:

> (a) Whoever violates any provision of section 1962 of this chapter . . . shall be fined not more than $25,000 or imprisoned not more than twenty years, or both, and shall forfeit to the United States (1) any interest he has acquired or maintained in violation of section 1962, . . . and (2) any interest in, security of, claim against, or property or contractual right of any kind affording a source of influence over, any enterprise which he has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962. . . .
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> . . . .
>
> (c) Upon conviction of a person under this section, the court shall authorize the Attorney General to seize all property or other interest declared forfeited under this section upon such terms and conditions as the court shall deem proper. If a property right or other interest is not exercisable or transferable for value by the United States, it shall expire, and shall not revert to the convicted person.

Id.

44. 21 U.S.C. § 848 (1982). CCE provides that:

> (a) Penalties; forfeitures
>
> (1) Any person who engages in a continuing criminal enterprise shall be sentenced to a term of imprisonment which may not be less than 10 years and which may be up to life imprisonment, to a fine of not more than $100,000, and to the forfeiture prescribed in paragraph (2); except that if any person engages in such activity after one or more prior convictions of him under this section have become final, he shall be sentenced to a term of imprisonment which may not be less than 20 years and which may be up to life imprisonment, to a fine of not more than $200,000, and to the forfeiture prescribed in paragraph (2).
>
> (2) Any person who is convicted under paragraph (1) of engaging in a continuing criminal enterprise shall forfeit to the United States—
>
> (A) the profits obtained by him in such enterprise, and
>
> (B) any of his interest in, claim against, or property or contractual rights of any kind affording a source of influence over, such enterprise.

Acts results from Congress's explicit inclusion of profits as forfeitable assets under CCE.[45]

Congress intended the forfeiture provisions to give law enforcement authorities an effective "hit them where they hurt"[46] mechanism for attacking the economic power base of organized crime.[47] The statutes, through traditional fines, incarceration, and civil forfeiture, as well as criminal forfeiture, thus aimed at three targets: the individual criminal, the property used in the criminal activity, and the proceeds of the illicit activity.[48] Numerous passages in the statements of purpose and legislative history of RICO and CCE emphasize congressional intent to provide for expansive criminal forfeiture.[49]

Although the forfeiture provisions appeared to provide the ideal opportunity for confiscating the spoils of organized criminal activity,[50] RICO and CCE forfeiture failed to live up to original expectations. The Department of Justice brought only ninety-eight prosecutions for drug violations during the first ten years of operation under RICO and CCE. The prosecutions eventually recovered less than two million dollars.[51] The lack of success in enforcing RICO and CCE derived in part from prosecutorial hesitancy to rely on such a new and untested idea. To a great extent, however, inadequacies in

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(b) "Continuing criminal enterprise" defined

For purposes of subsection (a) of this section, a person is engaged in a continuing criminal enterprise if—

(1) he violates any provision of this subchapter or subchapter II of this chapter the punishment for which is a felony, and

(2) such violation is a part of a continuing series of violations of this subchapter or subchapter II of this chapter—

(A) which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and

(B) from which such person obtains substantial income or resources.

Id.

45. For a detailed comparison of RICO and CCE forfeiture provisions, see H. MYERS & J. BRZOSTOWSKI, *supra* note 2, at 327.

46. United States v. Martino, 681 F.2d 952, 957 n.17 (5th Cir. 1982) (Politz, J., dissenting).

47. SENATE COMM. ON THE JUDICIARY, ORGANIZED CRIME CONTROL ACT OF 1969, S. REP. No. 617, 91st Cong., 1st Sess. 79 (1969). *See generally* G. BLAKEY, TECHNIQUES IN THE INVESTIGATION AND PROSECUTION OF ORGANIZED CRIME: MATERIALS ON RICO (1980) (background of RICO with emphasis on enforcement); Note, *RICO: Are the Courts Construing the Legislative History Rather than the Statute Itself?*, 55 NOTRE DAME LAW. 777 (1980) (analyses of RICO legislative history and its interpretation); Project, *White Collar Crime: Second Annual Survey of Law*, 19 AM. CRIM. L. REV. 173, 353-70 (1981) (analysis of early applications of RICO).

48. *See* Weiner, *supra* note 8, at 235-36.

49. The preamble to the Organized Crime Control Act of 1970, 18 U.S.C. §§ 1961-1968 (1982) provides that:

> It is the purpose of this Act to seek the eradication of organized crime in the United States by strengthening the legal tools in the evidence-gathering process, by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime.

50. 116 CONG. REC. 591 (1970) (statement of Sen. McClellan).

51. *See* COMPTROLLER GENERAL, *supra* note 1, at 11. Between 1970 and 1980, 73 cases were brought under CCE, 16 under RICO, and 9 jointly under CCE and RICO. *Id.*

the statutory forfeiture provisions caused the failure of criminal forfeiture.[52]

The original congressional attempts to create effective criminal forfeiture provisions engendered two major problems. First, the broadest provisions of RICO applied only to "interests"[53] in the racketeering organization. CCE, although specifically making profits forfeitable,[54] failed to differentiate between gross profits and net profits.[55] These ambiguities resulted in restrictive court interpretations that limited RICO forfeiture to interests other than profits[56] and restricted CCE forfeitures to net profits, which are difficult to prove conclusively.[57]

Second, both RICO and CCE applied the traditional in personam version of forfeiture that provides for divestiture of property only upon conviction of the defendant. Since criminal forfeiture does not relate back to the time of the crime, the statutes limit the government's ability to prevent defendants from protecting or disposing of potentially forfeitable assets.[58] RICO and CCE provide mechanisms designed to prevent preconviction shielding of forfeitable property, but only application of the taint theory of civil in rem forfeiture would render such transactions voidable.[59]

C. *Comprehensive Forfeiture Act of 1984*

Congress passed the Comprehensive Forfeiture Act of 1984 in an attempt to remedy the inadequacies of RICO and CCE.[60] The Act, which was part of the Comprehensive Crime Control Act of 1984, provided several major changes in the provisions of RICO and CCE. The first change addressed judicial uncertainty with respect to forfeitability of proceeds from a criminal enterprise under RICO. The Act explicitly made subject to forfeiture both

52. *See* Hughes & O'Connell, *supra* note 9, at 621-22.

53. 18 U.S.C. § 1963(a) (1982).

54. 21 U.S.C. § 848(a)(2)(A) (1982).

55. *See* Hughes & O'Connell, *supra* note 9, at 622.

56. *See, e.g.*, United States v. McManigal, 708 F.2d 276, 284 (7th Cir.), *vacated*, 104 S. Ct. 419, 78 L. Ed. 2d 355 (1983); United States v. Marubeni Am. Corp., 611 F.2d 763, 766-67 (9th Cir. 1980).

57. For an example of the difficulty in court calculation of net profits, see United States v. Jeffers, 532 F.2d 1101, 1117 (7th Cir. 1976), *aff'd in part*, 432 U.S. 137 (1977).

58. S. REP. NO. 520, 97th Cong., 2d Sess. 4 (1982). The report explained that whereas civil forfeiture means that the government takes possession of the property at or soon after the forfeiture action's commencement, in criminal forfeiture the defendant generally retains control of the asset until or after his criminal conviction. Any forward-thinking criminal therefore has both an incentive and an opportunity "to transfer his assets or remove them from the jurisdiction of the court prior to trial and so shield them from any possibility of forfeiture." *Id.*

59. *Id.* The report stated that only the authority to obtain a restraining order allows the government to prevent a defendant from circumventing forfeiture, but such restraining orders are only statutorily authorized in the post-indictment period. No protective order is thus available to the government even in cases where a person disposes of assets in anticipation of the government's filing criminal charges against him. If the government does obtain a restraining order a defendant can defy it, circumvent forfeiture by disposing of his property, and yet face no greater risk than possible contempt sanctions. The defendant would thus escape any economic impact of the forfeiture sanction. *Id.*; *see also* SENATE FORFEITURE REPORT, *supra* note 10, at 196 (analysis of pre-amendment forfeiture inadequacies).

60. Comprehensive Forfeiture Act of 1984, Pub. L. No. 98-473, § 302, 98 Stat. 2040 [hereinafter referred to in the text as the Act].

direct and indirect proceeds of organizations that violate the substantive provisions of RICO section 1962.[61] When Congress drafted the Act circuit court rulings conflicted on that issue,[62] but the Supreme Court preempted Congress in *Russelo v. United States*[63] by recognizing that RICO forfeiture encompassed proceeds of racketeering activity.[64]

Second, the Act established that profits under CCE and RICO meant gross profits rather than net profits.[65] This clarification eliminated the prosecutor's burden to calculate the expenses of an illicit enterprise and then deduct that amount from the business's profits to determine a forfeitable amount.[66] Consequently, passage of the Act substantially eased the burden of proof in forfeiture actions.

Finally, the Act codified the taint theory of in rem forfeiture. RICO section 1963(c) now provides that title to forfeited property vests in the United States as of the commission of the criminal act, not at the time of conviction of its owner.[67] Under the current statute the forfeitable property becomes tainted at the time that the RICO or CCE violation occurs, and courts can

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61. RICO § 1963, as amended by the Comprehensive Forfeiture Act of 1984, includes as forfeitable property:

> (1) any interest the person has acquired or maintained in violation of section 1962; . . .
>
> (2) any—
>
> (A) interest in;
>
> (B) security of;
>
> (C) claim against; or
>
> (D) property or contractual right of any kind affording a source of influence over; any enterprise which the person has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962 . . . ; and
>
> (3) any property constituting, or derived from, any proceeds which the person obtained, directly or indirectly, from racketeering activity or unlawful debt collection in violation of section 1962.

18 U.S.C.A. § 1963(a) (West Supp. 1985).

62. *See* United States v. McManigal, 708 F.2d 276, 283-87 (7th Cir. 1983) ("any interest" provision of RICO held not to include income, proceeds, or profits); United States v. Martino, 681 F.2d 952, 961-62 (5th Cir. 1982) (insurance proceeds obtained by arson ring held forfeitable under RICO), *aff'd sub nom.* Russello v. United States, 464 U.S. 16 (1983); United States v. Marubeni Am. Corp., 611 F.2d 763, 776 (9th Cir. 1980) (interpreting RICO as providing for forfeiture of direct interests in racketeering activity but not proceeds of that activity).

63. 464 U.S. 16 (1983).

64. *Id.* at 23.

65. 21 U.S.C.A. § 848 (West Supp. 1985).

66. *Id.*

67. 18 U.S.C.A. § 1963(c) (West Supp. 1985). Section 1963(c) of RICO, as amended by the Comprehensive Forfeiture Act of 1984 provides that:

> (c) 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 believe that the property was subject to forfeiture under this section.

Id.

thus void any transfer of the property.[68] RICO provides one exception to the taint theory. If a defendant sells tainted property for value to a bona fide purchaser without actual or constructive notice that the property was subject to forfeiture, the transfer will stand.[69]

Although the passage of RICO and CCE in 1970 created extensive legislative history and discussion of statutory purpose, very few interpretive aids accompanied the Comprehensive Forfeiture Act of 1984.[70] The Act, however, clearly manifested two general purposes. First, Congress objected to the unwillingness of federal prosecutors to implement criminal forfeiture under either RICO or CCE.[71] Second, Congress desired to reverse the narrow interpretations that courts had given the statutes.[72] Armed with a new understanding of the way that Congress intended criminal forfeiture to operate, federal prosecutors quickly began to seek RICO and CCE forfeitures more vigorously than ever before.[73]

II. THE RIGHT TO COUNSEL AND THE ATTORNEY-CLIENT PRIVILEGE

The application of recently expanded federal criminal forfeiture to attorneys' fees and fee information raises several issues in two important areas. First, the extension of criminal forfeiture to attorneys' fees and fee information may contravene a defendant's constitutional right to counsel. Second, the expansion of criminal forfeiture into these areas could conflict with the attorney-client privilege. This section of the Comment briefly summarizes the right to counsel and the attorney-client privilege. The next section explores the potential problems that criminal forfeiture of attorneys' fees raises in these areas and analyzes judicial considerations of these problems.

The sixth amendment to the United States Constitution creates the legal right to assistance of counsel in all criminal cases.[74] The Supreme Court has expanded this right to include the right of indigent or illiterate defendants to have counsel appointed for them in cases involving potential imprisonment.[75] Furthermore, the Court has held that the right to counsel does not

68. *Id.*; *see* Payden v. United States, 605 F. Supp. 839, 849 n.14 (S.D.N.Y.), *rev'd on other grounds*, 767 F.2d 26 (2d Cir. 1985).

69. 18 U.S.C.A. § 1963(c) (West Supp. 1985).

70. The Act passed Congress so rapidly that the copy signed by President Reagan on October 12, 1984, omitted some material, and the United States Code advance sheet included provisions not contained in the final version of the statute. *See* United States v. Rogers, 602 F. Supp. 1332, 1336 (D. Colo. 1985).

71. *See* SENATE FORFEITURE REPORT, *supra* note 10, at 191-92.

72. *See id.*

73. *See* Merkle & Moscarino, *Are Prosecutors Invading the Attorney-Client Relationship?*, 71 A.B.A. J. 38 (1985); Friedman, *Prosecutor's Attempts to Seize Lawyer Fees Irk Defense Attorneys*, Wall St. J., Aug. 12, 1985, at 1, col. 1; Siegel, *Has U.S. Put Lawyers on Defensive?*, L.A. Times, June 14, 1985, at 1, col. 1.

74. U.S. CONST. amend. VI.

75. The sixth amendment originally did not guarantee court-appointed or publicly subsidized counsel, but instead merely assured a defendant that third parties would not frustrate his attempts to procure counsel. *See* Andersen v. Treat, 172 U.S. 24, 29 (1898); W. BEANEY, THE RIGHT TO COUNSEL IN AMERICAN COURTS 27-76 (1972); Note, *Sixth Amendment Guarantees Assistance of Counsel that is Reasonably Effective and Does Not Prejudice the Fairness of the Proceeding*, 14 U. BALT. L. REV. 335, 336 (1985). In Powell v. Alabama, 287 U.S. 45

merely require appointment of an attorney,[76] but also implies the right to effective assistance of competent counsel[77] and that conflicts of interest,[78] inadequate preparation time, or active interference by the state can prevent exercise of the right.[79] Finally, the court has decreed that a defendant has a qualified right to counsel of his choice if he can afford his own attorney.[80]

The attorney-client privilege shares the sixth amendment's foundation in the jurisprudence of the adversarial system, but is an evidentiary privilege, not a constitutional right. According to the common law the attorney-client privilege protects from disclosure any communication between an attorney and a client or a prospective client when the attorney is acting in a professional capacity.[81] The most common rationale for the privilege is that only by protecting communications between an attorney and the client can the

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(1932), the Supreme Court first held that the right to counsel includes the right of indigent and illiterate defendants to have counsel appointed for them in capital cases. *Id.* at 71. An important extension of the right soon followed in Johnson v. Zerbst, 304 U.S. 458 (1938), in which the court first made the right to appointed counsel available to all federal felony defendants. *Id.* at 463; *see also* FED. R. CRIM. P. 44 (codifying the *Johnson* rule); 18 U.S.C. § 3006A(b) (1982) (amendment to Criminal Justice Act of 1964 excluding petty offenders from the right to appointed counsel). The Court then extended the sixth amendment right to appointed counsel to state felony defendants and finally to any state defendants who face the threat of actual imprisonment. *See* Gideon v. Wainwright, 372 U.S. 335, 342 (1963) (state felony defendant's right to assistance of counsel held to be implicit in fourteenth amendment guarantee of fair trial); Argersinger v. Hamlin, 407 U.S. 25, 37 (1972) (both sixth and fourteenth amendments held to assure defendant right to counsel if penalty involves actual imprisonment).

76. *See* Avery v. Alabama, 308 U.S. 444, 446 (1940) (constitutional right to counsel implies opportunity of defendant to meet with counsel).

77. McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970).

78. *See* Cuyler v. Sullivan, 446 U.S. 335, 349-50 (1980) (actual conflict of interest can deprive defendant of sixth amendment right to counsel).

79. *See* Geders v. United States, 425 U.S. 80, 91 (1976) (petitioner's sixth amendment rights violated when prosecutor prevented petitioner from consulting with his counsel during trial recess); *In re* Grand Jury Matters, 751 F.2d 13, 19 (1st Cir. 1984) (grand jury subpoenas presented to defense attorneys in process of representing individuals under investigation by grand jury held to violate individual's sixth amendment rights); *see also* Strickland v. Washington, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984) (deficient performance by counsel that creates prejudice to defendant's case constitutes ineffective assistance of counsel and grounds for reversal); Comment, *Effective Assistance of Counsel: The Sixth Amendment and the Fair Trial Guarantee*, 50 U. CHI. L. REV. 1380, 1385-1426 (1983) (analysis of approaches to determining effectiveness of counsel).

80. Urquhart v. Lockhart, 726 F.2d 1316, 1319 (8th Cir. 1984); *see also* Linton v. Perini, 656 F.2d 207, 209 (6th Cir. 1981), *cert. denied*, 454 U.S. 1162 (1982) (when defendant seeks to delay trial in order to replace counsel, court must balance defendant's rights against need for efficient operation of courts). For example, when a defendant attempts to use his right to counsel to delay the trial, the public's interest in the efficient administration of justice will foreclose the defendant's right to counsel. *See* United States v. Burton, 584 F.2d 485, 489 (D.C. Cir. 1978); Amicus Curiae Brief of National Association of Criminal Defense Lawyers at 7-8, United States v. Sheehan, No. 84-198 (E.D. Cal. filed Aug. 9, 1985).

81. *See* United States v. United Shoe Mach. Corp., 89 F. Supp. 357, 358-59 (D. Mass. 1950). In *United Shoe* the court provided the following definition of the attorney-client privilege:

> [t]he privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the

attorney assume that the client has fully disclosed all information that is necessary to formulate an effective defense.[82]

The sixth amendment guarantee of effective assistance of counsel and the attorney-client privilege overlap to some degree. Both would prevent a defense attorney from divulging confidential client information.[83] One definition of the attorney-client privilege, the incrimination rationale, defines even nonconfidential information as privileged if the opposing counsel could use the information against the defendant.[84] Thus, since the sixth amendment right to effective assistance of counsel prevents disclosure only of communications within the confidential attorney-client relationship,[85] the incrimination rationale presents broader protection than the sixth amendment.

An issue that is closely related to the scope and applicability of the attorney-client privilege is the ethical precept that prohibits disclosure of "information relating to representation of a client."[86] This precept extends not only to confidential communication, but also to anything that the client requests the attorney to keep secret or anything that might embarrass the client, regardless of the source of the information or the fact that nonclients also know the information.[87] An attorney must thus consider the consequences of both a legal violation and an ethical violation upon forced or voluntary disclosure of any client information.[88]

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purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.

Id.; *see* Wonneman v. Stratford Sec. Co., 23 F.R.D. 281, 285 (S.D.N.Y. 1959) (interpreting common law privilege).

82. *See In re* Shargel, 742 F.2d 61, 62 (2d Cir. 1984) (quoting J. WEINSTEIN & M. BERGER, EVIDENCE ¶ 503(02) (1982)).

83. *See* United States v. Valencia, 541 F.2d 618, 621 (6th Cir. 1976) (government informant's disclosure of privileged information also infringed sixth amendment right to counsel); United States v. King, 536 F. Supp. 253, 264-65 (C.D. Cal. 1982) (sixth amendment right to counsel and attorney-client privilege both based on confidentiality of communication between attorney and client). The court in Payden v. United States, 605 F. Supp. 839, 846 (S.D.N.Y.), *rev'd on other grounds*, 767 F.2d 26 (2d Cir. 1985), concluded that the scope of the attorney-client privilege and information privileged under the sixth amendment coincide.

84. *See* Payden v. United States, 605 F. Supp. 839, 846 (S.D.N.Y.), *rev'd on other grounds*, 767 F.2d 26 (2d Cir. 1985). The incrimination rationale definition of the attorney-client privilege is thus currently the law in at least one circuit.

85. *Id.*; see United States v. Melvin, 650 F.2d 641, 645 (5th Cir. 1981) (disclosure of information violates the sixth amendment when such disclosure also violates confidential attorney-client relationship).

86. *See* Statement of Meshbesher, *supra* note 15, at 9.

87. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(A), (B) (1979).

88. Another important situation in which this dilemma arises is in the area of tax law. Recently adopted modifications to the tax code require anyone receiving cash payments in excess of a statutory minimum to report the cash receipt to the I.R.S. Tax Reform Act of 1984, 26 U.S.C.A. § 6050(I) (West Supp. 1985). The statute also requires the recipient to report the name, address, and taxpayer identification number of the client making the cash payment. *See* Kirsch, *War on Lawyers*, CAL. LAW., Mar. 1985, at 31, *cited in* Statement of Meshbesher, *supra* note 15, at F-4. The reporting requirement raises the same ethical and attorney-client privilege issues as the potential disclosure of client information resulting from CCE and RICO investigations. *See* Amicus Curiae Brief of the National Association of Criminal Defense Lawyers in Opposition to Motion to Dismiss at 16, Saint-Veltri v. United States, No. 85-K-501 (D.C. Colo. filed Feb. 21, 1985).

III. CHALLENGES TO CRIMINAL FORFEITURE OF ATTORNEYS' FEES

The four district courts[89] and one appellate court[90] that have interpreted CCE and RICO forfeiture addressed twofold challenges to the statutes.[91] The challenges involve: (1) the effect of procedural mechanisms for enforcing the statutes, such as subpoenas of payment records and other methods of obtaining fee information from defense counsel, on the attorney-client privilege; and (2) the effect of substantive fee forfeiture itself. The courts' analyses of substantive forfeiture have concentrated on the potential applicability of an attorneys' fees exception to CCE and RICO. Two of the cases considered whether Congress intended to create this exception; all of the courts heard arguments that an attorney's fees exception must be judicially read into the statutes.[92]

A. The Threat of Fee Information Disclosure on the Attorney-Client Relationship

The methods and procedures that federal prosecutors employ potentially infringe on the attorney-client relationship in several ways. These possible infringements all involve the use of various information gathering mechanisms that are necessary for preparing cases against individuals and forfeitable property. The most common mechanism is the pre-trial subpoena,[93] but other devices such as statutory informational hearings and IRS cash disclosure rules may also adversely affect the attorney-client relationship.[94]

1. Effect of Subpoenas on Trial Preparation. The first possible infringement on a defendant's rights involves the effect of a government subpoena on defense counsel's readiness for trial. In *Payden v. United States*[95] defense counsel received a subpoena from the government, followed by a grand jury subpoena duces tecum for information about counsel's fee arrangement. The government withdrew the subpoena, and defense counsel filed a motion to quash the grand jury subpoena. The defendant argued that to respond to a subpoena at a critical time in such a complicated case would take time and

89. United States v. Ianiello, No. S 85 Cr. 115, slip op. (S.D.N.Y. Sept. 3, 1985); United States v. Badalamenti, 614 F. Supp. 194 (S.D.N.Y. 1985); Payden v. United States, 605 F. Supp. 839 (S.D.N.Y.), *rev'd on other grounds*, 767 F.2d 26 (2d Cir. 1985); United States v. Rogers, 602 F. Supp. 1332 (D. Colo. 1985).

90. Payden v. United States, 767 F.2d 26 (2d Cir. 1985).

91. Courts have also addressed challenges to criminal forfeiture relying on grounds other than the potential for violation of the attorney-client privilege and sixth amendment. The court in *Rogers*, in addition to issuing the first decision on the attorney-client relationship challenge, also heard allegations that RICO criminal forfeiture violated the defendant's right to due process and created an ex post facto law. 602 F. Supp. at 1334. The court rejected interpretation of RICO as an ex post facto law and similarly disposed of the characterization of the statute as unconstitutionally vague. *Id.* at 1340-41. For further analysis of RICO and the right to procedural due process, see Reed & Gill, *RICO Forfeitures, Forfeitable "Interests," and Procedural Due Process*, 62 N.C.L. REV. 57 (1983).

92. *See supra* note 89.

93. FED. R. CRIM. P. 17(c).

94. *See* 18 U.S.C.A. § 1963(m) (West Supp. 1985); 26 U.S.C.A. § 6050 (West Supp. 1985).

95. 605 F. Supp. 839 (S.D.N.Y.), *rev'd on other grounds*, 767 F.2d 26 (2d Cir. 1985).

effort away from preparation of the defense and thereby impair effectiveness of counsel.

The court cited a First Circuit decision[96] that based its holding upon such an argument, but then stated that even during the pendency of trial the people's right to unprivileged information may outweigh the defendant's right to trial preparation without disruption.[97] The *Payden* court concluded that defense counsel had sufficient time to prepare for trial, even given the inherent complexity of a CCE defense.[98] The *Payden* decision, coupled with the First Circuit's decision in *In re Grand Jury Matters*,[99] leaves open the possibility that a subpoena of defense counsel in a RICO or CCE case might constitute a sixth amendment violation based entirely on the distraction posed to the true defense effort.

2. Threat of Disclosure and the Attorney-Client Relationship. The second right-to-counsel argument posits that the mere threat that an attorney might be subpoenaed, called as a witness, forced to disclose cash transactions, or otherwise compelled to disclose confidential or privileged client information creates a chilling effect on the attorney-client relationship.[100] In some cases such disclosure also could force defense counsel to withdraw from a case, thus entirely destroying the attorney-client relationship. In another context the Supreme Court has held that a chilling effect on constitutional rights is sufficient to justify invalidating a statute.[101] Consequently, every court that has addressed the constitutionality of the Act has considered arguments that the Act chills the attorney-client relationship.

Four courts have addressed the issue of the chilling effect from forced disclosure of fee information.[102] Three of the courts have relied on the effect in one form or another either to invalidate practices requiring such disclosure or to read an attorneys' fees exception into the Act.[103] The fourth court minimized the importance of potential chilling of the attorney-client relationship and emphasized its belief that defense attorneys' actual trial performances would not be affected.[104]

The court in *United States v. Rogers*[105] found that the threat of actual forfeiture produced a chilling effect on the use of assets in securing coun-

96. *In re* Grand Jury Matters, 751 F.2d 13 (1st Cir. 1984).

97. *Payden*, 605 F. Supp. at 848 (quoting from *In re* Grand Jury Matters, 751 F.2d 13, 19 (1st Cir. 1984)).

98. 605 F. Supp. at 848.

99. 751 F.2d 13 (1st Cir. 1984).

100. The chilling effect results when a statute stops short of explicitly or impliedly denying constitutional rights but creates enough uncertainty over its scope that parties deliberately choose not to exercise questionably affected rights. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-30 (1978).

101. *Id.*

102. *See Ianiello*, slip op. at 8-10; *Badalamenti*, 614 F. Supp. at 196-97; *Payden*, 605 F. Supp. at 846-48; *Rogers*, 602 F. Supp. at 1348.

103. *See Ianiello*, slip op. at 8-10; *Badalamenti*, 614 F. Supp. at 196-97; *Rogers*, 602 F. Supp. at 1348.

104. *See Payden*, 605 F. Supp. at 848.

105. 602 F. Supp. 1332 (D. Colo. 1985).

sel.[106] The court further held that the threat of future disclosure of confidential fee information chilled the free communication that is necessary for effective assistance of counsel.[107] Specifically, in a RICO section 1963(m) hearing on forfeitability of assets[108] an attorney who wished to protect his fees would need to disclose more than just his rate and the hours that he expended on the case.[109] Such a hearing would provide the government with an opportunity to ascertain the attorney's knowledge of his client's assets and financial situation.[110] The court noted that the menace of such a hearing would prevent open communication between attorney and client, impair the attorney's ability to represent his client effectively, and thus violate the sixth amendment right to counsel.[111]

The *Rogers* court also noted that inquiry into the scope of the defendant's assets would divulge information that is crucial to the government's case against the defendant.[112] Ignoring the apparent statutory intent that section 1963(m) hearings occur after the verdict,[113] the court concluded that information that is made available to prosecutors at such a hearing greatly exceeded the scope of the attorneys' fee information exception to the attorney-client privilege.[114] The government thus would force withdrawal of attorneys by placing defense counsel in the dilemma of testifying at a 1963(m) hearing or losing their fees.[115] The *Rogers* opinion noted that the government could thus effectively rid the adversary process of the adversary.[116]

In *United States v. Ianiello*[117] a New York district court also analyzed the potential chilling effect of RICO section 1963(m).[118] The court concluded that the restriction upon a client's candor that would result from potential disclosure of privileged material violated the sixth amendment right to effective representation.[119]

In *United States v. Badalamenti*[120] the same court that decided *Ianiello* addressed the effects of RICO and CCE criminal forfeiture on the attorney-client relationship in the context of a trial subpoena. The court noted, however, that forfeiture issues arise both at trial, when the government can seek a special forfeiture verdict, and at post-trial hearings, on the attorney's right to exemption from forfeiture as a bona fide purchaser for value who had no

106. *Id.* at 1349; *see infra* text accompanying notes 145-46.
107. 602 F. Supp. at 1348.
108. *See* 18 U.S.C.A. § 1963(m) (West Supp. 1985).
109. *Rogers*, 602 F. Supp. at 1349.
110. *Id.*
111. *Id.* at 1348-49.
112. *Id.* at 1349.
113. *See* 18 U.S.C.A. § 1963(m) (West Supp. 1985).
114. 602 F. Supp. at 1349.
115. *Id.* at 1350.
116. *Id.*
117. No. S 85 Cr. 115, slip op. (S.D.N.Y. Sept. 3, 1985).
118. *Id.* at 8-10.
119. *Id.* at 11.
120. 614 F. Supp. 194 (S.D.N.Y. 1985).

notice of the property's forfeitability.[121] The *Badalamenti* court relied primarily on the *Rogers* court's reading of legislative history and held that RICO and CCE forfeiture do not apply to attorneys' fees.[122]

The court further determined that disclosure of fee information as proof of defendant's illegal profits created a separate sixth amendment violation.[123] The court did not address the threshold argument that potential disclosure of confidential information chills the attorney-client relationship. Instead, the court emphasized the effect of forcing defense counsel to withdraw due to such disclosure.[124] The court reasoned that fee information is relevant to whether a defendant received substantial profits from illegal activity. Consequently, a good chance exists in CCE and RICO cases that the government would require an attorney to divulge confidential information and thereby cause him to withdraw from the case pursuant to the Code of Professional Responsibility.[125]

The court found that the potential for inducing withdrawal necessitated application of a rigorous relevance and need standard to the subpoena.[126] In *Badalamenti* the court quashed the subpoena because the government failed to show substantial need for the evidence.[127] The court also noted that because the government obtained the subpoena ten months after indictment and six months after defense counsel's appearance, defendant's necessity to replace counsel would more greatly prejudice his sixth amendment rights than in a case in which counsel received a subpoena soon after his appointment.[128]

The potential chilling effect and loss of counsel arguments failed to persuade the trial court in *Payden* to hold that attorneys' fees were exempt from forfeiture or that forfeiture violated the sixth amendment. In *Payden* defense counsel received a grand jury subpoena duces tecum.[129] The defense argued that testifying before the grand jury would chill the attorney-client relationship and erode effective assistance of counsel.

The court conceded that potentially chilling disclosure can occur at three stages in litigation: (1) by testimony of a nonconspirator witness, or by counsel's stipulation; (2) by defense counsel's testimony at a grand jury proceeding; or (3) by testimony of such counsel at trial.[130] According to the court, however, disclosure of the first type would not intrude on a defend-

121. *Id.* at 196; *see* 18 U.S.C.A. § 1963(m) (West Supp. 1985); 21 U.S.C.A. § 853(m) (West Supp. 1985).

122. *Badalamenti*, 614 F. Supp. at 196-97.

123. 614 F. Supp. at 199.

124. *Id.*

125. *Id.* (citing MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-102(B) (1979)). The disciplinary rule requires an attorney to withdraw from a case when he perceives that he must testify to the possible prejudice of his client.

126. *Badalamenti*, 614 F. Supp. at 198.

127. *Id.* at 201.

128. *Id.* at 198 (citing *In re* Grand Jury Subpoena Served upon John Doe, Esq., 759 F.2d 968, 970 (2d Cir. 1985)).

129. *See* FED. R. CRIM. P. 44.

130. 605 F. Supp. at 850. The *Payden* court failed to consider the implications of the fourth potential stage of disclosure in a RICO or CCE case, the § 1963(m) hearings.

ant's rights at all.[131] The court further asserted that disclosure of the second type would not materially interfere with the advocate's function or deprive the defendant of a fair trial.[132] Thus, the court concluded that counsel's appearance before a grand jury would not infringe on a defendant's sixth amendment rights.

With respect to the third situation in which potentially chilling disclosure can occur, the *Payden* court argued that although the Code of Professional Responsibility requires counsel to withdraw upon testifying against his client,[133] such forced withdrawal does not qualify as a per se violation of the defendant's right to effective counsel pursuant to the sixth amendment.[134] The court cited cases holding that withdrawal of counsel is an acceptable alternative when counsel's testimony is necessary.[135] The court thus reasoned that a limited withdrawal could preserve a defendant's right to counsel.[136] In this event counsel would not represent defendant before a jury, but could continue to aid in defense preparations.

Thus, the *Payden* court held that the threat of disclosure at any of three stages of litigation does not impair the defendant's right to counsel. In reaching this conclusion, however, the court either ignored or did not seriously consider the nature of the chilling effect argument. By focusing on whether testimony before a grand jury or at trial would affect defense counsel's preparation or trial performance, the *Payden* court neglected to consider the inhibition of confidential trust and communication that would result from the defendant's knowledge that his attorney might have to testify and disclose information.

The *Payden* court also failed to address the fourth potential opportunity for disclosure of confidential information: the section 1963(m) hearing. If the government seeks forfeiture of attorneys' fees or seeks to establish that the defendant had substantial undocumented income, the government may subpoena defense counsel. In every case in which the government seeks forfeiture of attorneys' fees, however, defense counsel must present an argument at a section 1963(m) hearing that he received his fees as a good faith purchaser without notice of the fees' potential forfeitability.[137] The certainty of disclosure at such a hearing provides a greater chilling effect on client communication than the possibility of disclosure from a subpoena. Thus, although the *Payden* court presented a convincing argument that forced withdrawal of counsel does not create an automatic violation of defendant's sixth amendment rights, the court failed to respond fully to the more persuasive argument that the menace of potential disclosure of confidential client information chills those same rights.

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131. *Id.* at 850-51.
132. *Id.* at 851.
133. *Id.* at 852 (citing MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-102(B) (1979)).
134. 605 F. Supp. at 852.
135. *Id.*
136. *Id.*
137. 18 U.S.C.A. § 1963(m) (West Supp. 1985).

3. Fee Disclosure as Inherently Prejudicial. One case involved a third argument against disclosure of fee information that such disclosure is inherently prejudicial and violates defendant's right to counsel. In *United States v. Badalamenti* defense counsel allegedly received a $500,000 retainer.[138] The court reasoned that disclosing such information would put defense counsel's credibility in issue and create juror resentment, even though the fee was within the normal range charged by experienced and well-known lawyers in complicated cases.[139]

B. The Implications of Attorneys' Fee Forfeiture on the Attorney-Client Relationship

The second major area of analysis under RICO and CCE criminal forfeiture involves the implications of actual forfeiture of attorneys' fees. Courts have addressed two arguments concerning a possible attorneys' fees exception under the statutes. The first argument proposes that attorneys may constitute bona fide purchasers and thus be exempt from forfeiture. The second argument suggests that courts should read an attorneys' fees exception into the Comprehensive Forfeiture Act of 1984 to preserve the constitutionality of the Act.

1. Attorneys as Bona Fide Purchasers. In *United States v. Rogers* a grand jury in Colorado returned a thirty-count indictment alleging, inter alia, forfeitures under RICO section 1963.[140] The defense counsel responded with motions to exclude attorneys' fees from forfeiture and objections to the government's request for restraining orders on transfer of the assets. Defense counsel argued that the Comprehensive Forfeiture Act did not apply to fees that are transferred to attorneys for performance of legitimate services and, alternatively, that forced forfeiture of attorneys' fees violated the Constitution.[141]

Arguments concerning the intended scope of forfeitable property under the Act are by nature speculative. Neither the sparse debate on the Act nor its legislative history indicate whether the Act requires forfeiture of attorneys' fees, but the Act itself provides that assets that are transferred to a third party are immune from forfeiture only when one of two conditions exist. First, a third party does not forfeit transferred assets when the party demonstrates that his title to the property predated the violation.[142] Second, one who qualifies as a bona fide purchaser for value of property after the violation without knowledge of the property's potential forfeitability may retain the property.[143]

The court in *Rogers* found that an attorney with knowledge of an indictment against his client has sufficient notice of the potential forfeitability of

138. 614 F. Supp. at 197.
139. *Id.* at 201.
140. 602 F. Supp. at 1334.
141. *Id.*
142. *See* 18 U.S.C.A. § 1963(c) (West Supp. 1985); 21 U.S.C.A. § 848(c) (1981).
143. *See* 18 U.S.C.A. § 1963(c) (West Supp. 1985); 21 U.S.C.A. § 848(c) (1981).

his client's assets and, therefore, does not qualify for the bona fide purchaser exception.[144] Thus, an attorney's fees constitute forfeitable property unless they are exempt from forfeiture for some other reason.[145] The *Rogers* court found the statutory language to be ambiguous and resorted to analysis of the Act's legislative history to determine whether the court could void fee payments to attorneys.

The court chose a footnote in a passage from the legislative history that gave several examples of situations that result in forfeitability of property. The court construed a reference to "sham or fraudulent transactions" to constitute an exclusive list of the circumstances in which forfeiture was intended.[146] The court then concluded that Congress intended forfeiture to apply only to sham or fraudulent transactions and asserted that since an attorney who accepts fees engages in neither fraud nor sham, his fees are exempt from forfeiture.[147]

The *Payden* court, refusing to look past the inapplicability of the bona fide purchaser rule, offered a different interpretation of the applicability of statutory forfeiture actions to attorneys' fees. The court found the *Rogers* decision to be contrary to the text of the legislative history and concluded that statutory language clearly established that attorneys could not be bona fide purchasers unless, at the time that they accepted the fees, they reasonably believed that they would not have to forfeit the defendant's property under the Act.[148] The court applied precedent that held knowledge of an indictment to be sufficient notice that assets are subject to forfeiture.[149] Since a defense attorney should have actual notice of the contents of the indictment of his client, the court rejected the bona fide purchaser argument as to attorneys.[150]

2. Judicially Implied Attorneys' Fees Exception. A second argument exists for reading the Comprehensive Forfeiture Act of 1984 as containing the attorneys' fees exception. This argument relies on the principle of statutory construction that a court should not interpret a statute so as to violate the

144. *See* 602 F. Supp. at 1346-47.

145. *See id.*

146. *Id.* at 1347; *see* SENATE FORFEITURE REPORT, *supra* note 10, at 209 n.47. The district court also cited a passage from the legislative history of § 303 of the Act, amending the criminal forfeiture provisions of CCE, which stated that "nothing in this section [dealing with in personam forfeiture] is intended to interfere with a person's Sixth Amendment right to counsel." 602 F. Supp. at 1347. Although the court correctly treated CCE's history as relevant in interpreting RICO, it's statement of the obvious lends nothing to understanding forfeiture's applicability to attorneys and artificially creates an answer when no answer exists. For a discussion of the difficulty some courts have in recognizing the relationship of RICO to CCE, and the resulting reluctance to apply the legislative history of one to the other, see Note, *Continuing Criminal Enterprise Statute: Effect of Forfeiture Provision on Third Parties*, 22 DUQ. L. REV. 171, 185-87 (1983).

147. *Rogers*, 602 F. Supp. at 1347.

148. *Payden*, 605 F. Supp. at 849 n.14.

149. *Id.* (citing United States v. Raimondo, 721 F.2d 476, 478 (4th Cir. 1983), *cert. denied*, 105 S. Ct. 133, 83 L. Ed. 2d 74 (1984); United States v. Long, 654 F.2d 911, 917 (3d Cir. 1981)).

150. 605 F. Supp. at 849 n.14.

Constitution because Congress presumably could not have intended such a result.[151] This view assumes, however, that the statute threatens a defendant's sixth amendment rights. Thus, analysis of the constitutional issues concerning the right to counsel becomes a prerequisite to a determination of the Act's applicability to attorneys' fees.

The courts have analyzed five major threats to the attorney-client relationship resulting from forfeiture of attorneys' fees. Several involve analysis of the dilemmas facing a defense attorney who is forced to balance economic reality against ethical ideals. Two others represent more direct threats to the very ability of a defendant to secure an attorney of his choice, or in extreme instances, any attorney at all.

The first argument that is linked to actual forfeiture anticipates a more serious threat to a defendant's sixth amendment rights than the chilling effect. The argument posits that forfeiture will not chill the right to counsel, but deny it entirely. One court accepted an argument that defendants faced with RICO and CCE forfeiture would be unable to retain counsel and unable to qualify for appointed counsel, a dilemma that completely deprives them of any representation.[152] In *United States v. Ianiello* the court reasoned that a defendant with some legitimate sources of income did not meet the indigency requirement in order to receive appointed counsel and thus did not qualify for counsel appointed pursuant to the Criminal Justice Act.[153] In *United States v. Badalamenti* the court conceded that if the government seized a defendant's assets pending forfeiture then he would clearly qualify for appointed counsel.[154] That court, however, found sixth amendment problems to exist when a court merely identified the defendant's assets as forfeitable under RICO or CCE.[155] It concluded that in such a situation attorneys would probably refuse to represent the defendant for fear of not receiving payment for their services.[156]

In reality the dilemma identified by the two courts does not exist. The language of the Criminal Justice Act requires only that a defendant be financially unable to retain counsel, not totally destitute.[157] The court in *Ianiello* admitted that the Criminal Justice Act allowed the judge great discretion in

151. *See Rogers*, 602 F. Supp. at 1348; 2A SUTHERLAND STATUTORY CONSTRUCTION § 45.11 (4th ed. 1984).

152. *Ianiello*, slip op. at 11-13. The Criminal Justice Act of 1964, § 2, 18 U.S.C. § 3006A(a) (1982), directs a court to appoint counsel for anyone who cannot afford to retain counsel. Rule 44 of the Federal Rules of Criminal Procedure reinforces the broad discretionary powers of judges in granting court-appointed counsel. The rule provides that "[e]very defendant who is unable to obtain counsel shall be entitled to have counsel assigned to represent him at every stage of the proceedings from his initial appearance before the federal magistrate or the court through appeal, unless he waives such appointment." FED. R. CRIM. P. 44.

153. Slip op. at 11-13; 18 U.S.C. § 3006(a) (1982).

154. 614 F. Supp. at 200.

155. *Id.* at 197-98.

156. *Id.*

157. 18 U.S.C. § 3006A(a) (1982). Closely associated with the right to appointed counsel is the question whether appointed counsel can provide adequate representation in extremely complicated and protracted RICO and CCE litigation. The *Rogers* and *Payden* courts acknowledged the importance of the question, but no case has fully litigated the issue. *See Payden*, 605 F. Supp. at 852; *Rogers*, 602 F. Supp. at 1349-50.

reviewing an application for appointed counsel.[158] Judges should thus willingly appoint counsel given the dire constitutional implications of denying it. Furthermore, the U.S. Attorney's Office asserted in *Ianiello* that it would not contest appointment of counsel in similar situations.[159]

The court in *United States v. Rogers* addressed a second threat to the attorney-client relationship. The defense alleged that a pretrial threat of forfeiture or a RICO and CCE restraining order on assets would create a chilling effect on the defendant's right to counsel of his choice. Such a threat might deter counsel with knowledge of the potential of forfeiture from representing defendants charged with RICO or CCE violations. A logical extension of that argument arose in *Rogers* and *Ianiello*, in which retained counsel entered conditional appearances.[160] Counsel in both cases threatened to withdraw if the court found the attorneys' fees forfeitable. The *Payden* court responded to a related argument that the prospect of forfeiting attorneys' fees would dissuade counsel from vigorous representation of a client.[161] The canons of professional responsibility require defense counsel to work zealously for a client regardless of the risk of forfeiting attorneys' fees.[162] Although the *Payden* opinion did not address the problem of conditional appearances, an attorney who makes a full appearance in a case involving forfeiture clearly faces a dilemma. The attorney must either continue to render services for which he may not receive payment or withdraw, violate the code of ethics, and face possible disciplinary action.

A third threat to the attorney-client relationship arises from substantive forfeiture provisions. Attorneys who take the risk of having their fees forfeited actually violate the Code of Professional Responsibility because the fee is, in effect, a contingent fee in a criminal case.[163] An attorney who accepted a CCE or RICO case with knowledge that the government alleged forfeitability of attorneys' fees would thus take a case in which payment depended upon securing acquittal of the client.

A fourth threat addresses the conflict of interests facing an attorney when his interest in keeping his fee is adverse to his client's best interest. The courts in *Ianiello* and *Badalamenti* addressed variations of the conflict of interest argument. The *Ianiello* court found that the threat of losing a fee may induce an attorney to push his client to plea bargain, or, conversely, to risk going to trial to seek an unlikely acquittal instead of advising his client to plead guilty and thus lose the fee.[164] The *Badalamenti* court found an additional conflict for defense counsel. Attorneys must diligently represent

158. Slip op. at 13.
159. *Id.*
160. *Ianiello*, slip op. at 4-7; *Rogers*, 602 F. Supp. at 1349.
161. 605 F. Supp. at 848; *see* United States v. Ramey, 559 F. Supp. 60, 62 (E.D. Tenn. 1981).
162. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-101(A)(2) (1979); *see Payden*, 605 F. Supp. at 848; People v. Woods, 117 Misc. 2d 1, 2, 457 N.Y.S.2d 173, 175 (Sup. Ct. 1982).
163. *Ianiello*, slip op. at 9; *see* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-106(c) (1979).
164. Slip op. at 13-14.

their clients,[165] but through such diligence may discover that their fees came from the proceeds of illegal activity.[166] In response to similar arguments the *Payden* court invoked rules requiring attorneys to avoid conflicts of interest and to withdraw if faced with unavoidable conflicts.[167] The court reasoned that appointed counsel would provide conflict-free representation and concluded that the criminal justice system should not allow defendants to hire the finest attorneys with ill-gotten gains.[168]

One last threat, which the *Rogers* court initially discussed, involves prosecutorial discretion and its effect on the attorney-client relationship. The *Rogers* court recognized that the right to seek forfeiture gives to the government the power to force withdrawal of opposing counsel until an attorney whom the state does not perceive to be a threat is chosen or appointed.[169] The court presumed that prosecutors would not manipulate opposing counsel, but nonetheless concluded that even the opportunity for such abusive practices presented an intolerable threat to due process.[170] The defense bar has focused its objections on the possibility that prosecutors will use the threat of forfeiture for "attorney shopping" until a defendant chooses an inexperienced or incapable defense attorney or seeks appointed counsel.[171] The *Rogers* court reasoned that in a RICO or CCE case counsel appointed soon before trial would lack the adequate preparation necessary to provide effective representation.[172]

Although the courts' concerns regarding actual forfeiture of attorneys' fees merit notice, they do not threaten the attorney-client relationship to as great an extent as do the problems associated with disclosure of confidential client information.[173] First, the availability of court-appointed counsel provides a safety net for a defendant's constitutional rights. As long as courts may appoint counsel, a defendant who is unable to retain counsel due to potential forfeitability of fees or one whose counsel withdraws a conditional appearance or withdraws for ethical reasons will not experience a denial of his sixth amendment right to an attorney. Additionally, defense disciplinary rules that regulate all attorneys' behavior prohibit defense attorneys from manipulating their clients to protect the attorneys' fees[174] and prohibit prosecutors from threatening forfeiture as a means of creating a conflict of inter-

165. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-101(A)(1) (1979).

166. 614 F. Supp. at 196-97. The knowledge that an attorney might gain through diligently seeking information regarding his client's problem could conceivably prevent the attorney from qualifying as a bona fide purchaser for value without notice of the potential forfeitability of his client's property. 21 U.S.C.A. § 1963(m) (West Supp. 1985); 18 U.S.C.A. § 853(n) (West Supp. 1985).

167. 605 F. Supp. at 850.

168. *Id.*

169. 602 F. Supp. at 1350.

170. *Id.*

171. *See* Statement of Meshbesher, *supra* note 15, at D-9.

172. *Rogers*, 602 F. Supp. at 1350-51.

173. *See supra* notes 74-88 and accompanying text.

174. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-105(A), 7-101(A)(1) (1979).

est between a defense counsel and his client.[175] Even if such situations should arise, a defendant may seek a post-conviction remedy when any attorney's behavior constitutes a violation of the constitutional guarantee of effective assistance of counsel.[176] The impact of actual forfeiture of attorneys' fees thus fails to provide adequate grounds for judicial creation of an attorneys' fees exception to the Comprehensive Forfeiture Act of 1984.

IV. DEPARTMENT OF JUSTICE RESPONSE TO THE PERCEIVED THREATS OF ATTORNEYS' FEE FORFEITURE

Three of the four district courts that have addressed the applicability of criminal forfeiture to attorneys' fees have agreed that Congress could not have intended to make attorneys' fees forfeitable or fee information subject to subpoena.[177] The courts relied on arguments that individually fall short of proving the conclusion that forfeiture of attorneys' fees violates a defendant's sixth amendment right to counsel and thus found it necessary to create an exception to a statute that Congress clearly intended to apply as broadly and uniformly as possible.[178] Furthermore, the courts ignored the distinction between effects of disclosure of fee information and effects of forfeiture itself.

The one court that was unpersuaded by challenges to the statute provides a similarly unjustifiable approach to the sixth amendment implications of forfeiture of attorneys' fees. The *Payden* court failed to consider adequately the chilling effect that disclosure of fee information poses.[179] Additionally, as a result of the court's failure to recognize the forfeiture-disclosure distinction, it disregarded potential judicial application of procedural remedies that could alleviate disclosure-related sixth amendment problems.

The Department of Justice quickly reacted to judicial concern over forced disclosure of attorney fee information by promulgating guidelines that restrict subpoenas of attorneys.[180] These guidelines require that the Assistant Attorney General authorize all subpoenas and that the Department make all reasonable attempts to obtain the information from alternate sources or voluntarily from the attorney prior to such authorization.[181] Significantly, the guidelines acknowledge the risk of disqualification posed to subpoenaed attorneys and require that the government's need for the information outweigh any such risk, and further require that the subpoenaed information not be

175. *See id.* DR 1-102(A)(5); *see also id.* EC 7-14 (government attorney should not use sovereign's power to harass parties or to impede just settlements or results).

176. *See* L. YACKLE, POSTCONVICTION REMEDIES §§ 30-32, 152-54 (1981) (analysis of postconviction remedies available to federal defendants).

177. *See Ianiello*, slip op. at 8-10; *Badalamenti*, 614 F. Supp. at 196-97; *Rogers*, 602 F. Supp. at 1348.

178. *See Payden*, 605 F. Supp. at 850 (analysis of congressional concern over expansive interpretation of forfeiture).

179. *Id.*

180. *See Justice Department Issues Guidelines on Subpoenas to Attorneys*, [Apr.-Sept.] 37 CRIM. L. REP. (BNA) 2479 (Sept. 25, 1985).

181. *Id.* at 2480.

subject to any privilege.[182] The guidelines are an important step toward protecting the attorney-client relationship because placing the power to authorize subpoenas in the hands of the Assistant Attorney General prevents local prosecutors from using the threat of a subpoena to "attorney shop." The balancing test provided by the guidelines, however, fails to take into account the greater threat posed by chilling of the attorney-client relationship.

A more satisfactory approach exists in a proposal made to the Department of Justice by the National Association of Criminal Defense Lawyers (NACDL).[183] The NACDL proposal replaces the ambiguous and easily manipulated balancing test of the Department of Justice guidelines with the requirement that the Assistant Attorney General not approve a subpoena request unless reasonable grounds exist to believe that the defendant has committed a crime and that his attorney has also engaged in criminal activity.[184] This standard is more stringent than anything suggested by the courts or by the Department of Justice thus far and would adequately safeguard the attorney-client relationship from any threat of prosecutorial manipulation or chiling effect.

The possible chilling effect posed by RICO and CCE post-forfeiture hearings[185] is a more difficult problem than the chilling effect posed by trial or grand jury testimony. Neither RICO nor CCE explicitly provides procedural safeguards for post-verdict forfeiture hearings.[186] The Department of Justice, recognizing this problem, has also promulgated guidelines specifically addressed to forfeiture of attorneys' fees.[187] Although the guidelines acknowledge that post-forfeiture hearings may disrupt communication between an attorney and his client, the guidelines merely require prosecutors to take that potential disruption into consideration when seeking forfeiture,[188] which clearly represents an inadequate solution to protection of the attorney-client relationship.

Dictum in the *Rogers* opinion implies a better alternative. The main purpose of a post-forfeiture hearing is to give parties who face forfeiture an opportunity to show that they were bona fide purchasers of the allegedly forfeitable property.[189] The *Rogers* court determined that a bona fide purchaser is one who takes property without notice of possible forfeiture.[190] The court concluded that an attorney has notice of potential forfeitability of

182. *Id.*
183. *See* Statement of Meshbesher, *supra* note 15, at D-1.
184. *See id.* at D-5.
185. 18 U.S.C.A. § 1963(m) (West Supp. 1985); *see* 21 U.S.C.A. § 853(n) (West Supp. 1985).
186. *See Rogers*, 602 F. Supp. at 1351.
187. *See* UNITED STATES DEPARTMENT OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL § 9-111.230 (1985) [hereinafter cited as ATTORNEYS' MANUAL]. The fee forfeiture guidelines require an attorney to prove that he had no notice of the possible forfeiture of the assets, yet concede that this requirement may impede the flow of information between the attorney and his client. *Id.*
188. *Id.*
189. *Rogers*, 602 F. Supp. at 1346-49.
190. *Id.* at 1351. The fee forfeiture guidelines provide extensive notice requirements. *See* ATTORNEYS' MANUAL, *supra* note 187, § 9-111.500.

property due to the indictment that his client faces.[191] Thus, since the case law indicates that notice of forfeitability is implicit in an indictment, in the case of attorneys, a post-forfeiture hearing has no meaning; therefore, the court could eliminate the hearing for attorneys without jeopardizing any constitutional right. The result is an elimination of any potential chilling effect resulting from post-trial disclosure.

The last objection to forfeiture of attorneys' fees was the potential chilling effect on the ability of a defendant to retain counsel of his choice.[192] Two courts expressed a fear that counsel appointed shortly before trial would not provide effective assistance in a complex RICO or CCE case.[193] Although such fears may have some justification, only defendants with legitimate assets have the right to choose their counsel.[194] When the government places a restraining order on a defendant's assets or threatens to institute forfeiture proceedings, then that defendant qualifies for federally appointed counsel.[195] If the appointed counsel performed inadequately, then the defendant could seek post-conviction relief, asserting a violation of his constitutional right to effective assistance of counsel.[196]

Subsequent to unfavorable verdicts in three of the four district court cases addressing criminal forfeiture, the government has apparently abandoned its efforts to apply vigorously the new forfeiture provisions of CCE and RICO.[197] Recently promulgated guidelines and one court of appeals' refusal to address the forfeiture issues, however, indicate that strict interpretation of the Comprehensive Forfeiture Act of 1984 may still prevail. Although the potential for constitutional violations accompanying such an interpretation is serious, by enforcing available procedural safeguards the Department of Justice can meet the goals of the Comprehensive Forfeiture Act of 1984 without creating an artificial and unneeded attorneys' fees exception.

191. *Rogers*, 602 F. Supp. at 1346-49.
192. *Id.* at 1348.
193. *Payden*, 605 F. Supp. at 852; *Rogers*, 602 F. Supp. at 1349-50.
194. *Rogers*, 602 F. Supp. at 1348.
195. *See* Criminal Justice Act of 1964, § 2, 18 U.S.C. § 3006A (1982); FED. R. CRIM. P. 44.
196. *See supra* note 176.
197. *See* United States v. Sheehan, No. 84-198 (E.D. Cal. filed Aug. 9, 1985) (government withdrew forfeiture allegations, but attempted to reserve right to allege forfeiture after verdict).