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The Constitutionality of Attorney Fee Forfeiture under RICO and CCE, 22 J. Marshall L. Rev. 155 (1988)

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THE CONSTITUTIONALITY OF ATTORNEY FEE FORFEITURE UNDER RICO AND CCE*

On January 11, 1988, the Fourth Circuit Court of Appeals ruled that the law firm of Caplin & Drysdale, one of Washington D.C.'s most respected tax firms, must forfeit to the government all the fees collected from one of its regular clients.[1] The court ordered this forfeiture because the client's large-scale marijuana trafficking led to conviction under the Continuing Criminal Enterprise Act ("CCE").[2] This statute, and the Racketeer Influenced and Corrupt Organizations Act ("RICO"),[3] each require defendants convicted of any of the crimes specified under the acts[4] to forfeit to the government any profits made from their criminal activity.[5] The definition of the

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* As this volume was going to press, the United States Supreme Court granted certiorari to two of the cases discussed in this comment, stating both cases are set for oral argument in tandem with each other. United States v. Monsanto; Caplin & Drysdale, Chartered v. United States, 109 S. Ct. 363 (1988). For a discussion of the *Monsanto* case, see *supra* notes 213-239. For a discussion of the *Caplin* case, see *supra* notes 184-206.

1. *In re* Forfeiture Hearing as to Caplin & Drysdale, 837 F.2d 637 (4th Cir. 1988). *See also* 56 U.S.L.W. 2411 (summary of *Caplan* case).

2. 21 U.S.C. § 848 (1984). CCE was originally part of Title II of the Comprehensive Drug Abuse Prevention and Control Act of 1970. Pub. L. No. 91-513, § 408, 84 Stat. 1265 (1970).

3. 18 U.S.C. §§ 1961-68 (1984). Originally, RICO was part of Title IX of the Organized Crime Control Act of 1970. Pub. L. No. 91-452, § 901(a), 84 Stat. 941 (1970).

4. Congress designed RICO to prohibit "racketeering activity," which includes both: 1. "any act or threat involving murder, kidnaping, gambling, arson, robbery, bribery, extortion, or dealing in narcotic or other dangerous drugs," and which has at least a one year prison penalty, 18 U.S.C. § 1961 (1)(A) (1982); and 2. several criminal offenses already punishable under other sections of the United States Code. *See generally* 18 U.S.C. § 1961 (1)(B) (1982) (listed offenses include sports bribery, embezzlement, mail fraud, wire fraud, and trafficking in contraband cigarettes).

CCE is directed at patterns of drug related criminal activity. 21 U.S.C. § 841 (1982). A racketeering pattern consists of two or more acts prohibited by RICO, committed by the same person, within ten years of each other. 18 U.S.C. § 1961 (5). The 1984 amendments eliminated the major differences between RICO and CCE and expanded CCE to cover most drug-related offenses. Note, *Attorney Fee Forfeiture*, 86 COLUM. L. REV. 1021, 1023 (1986). *See infra* notes 38-59 and accompanying text for a discussion of the 1984 amendments.

5. Forfeiture is "something to which the right is lost by the commission of a crime or fault or the losing of something by way of penalty." BLACK'S LAW DICTIONARY 584 (5th ed. 1979). The United States government has been using forfeiture penalties since the founding of the nation to reach profits and property gained through crime. Brickey, *Forfeiture of Attorneys' Fees: The Impact of RICO and CCE Forfeitures on the Right to Counsel*, 72 VA. L. REV. 493 n.1 (1986) [hereinafter Brickey] (citing early cases dealing with piracy, unlawful imports, and embargo violations).

kinds of property that are forfeitable under these statutes is extremely broad.[6] Attorneys' fees are not expressly excluded.[7]

The Caplin & Drysdale forfeiture order, following a similar ruling from the second circuit only weeks before,[8] caused Scott Wallace, the legislative counsel for the National Association of Criminal Defense Lawyers, Inc., to predict that such applications of RICO and CCE could mean "the end of the criminal defense bar as we know it."[9] The National Law Journal declared that the *Caplin* case "threatens the livelihood of . . . defense attorneys."[10] These decisions undoubtedly will have a far reaching effect on attorneys who represent criminal defendants.

Civil forfeiture proceedings also exist in other areas connected with criminal activity, such as gambling vessels, bribe money, and liquor. *Id.*(citing various U.S.C. sections). The traditional difference between civil and criminal forfeiture is that civil forfeiture is *in rem*, while criminal forfeiture is *in personam*. Note, *The Criminal Forfeiture Provisions of the RICO and CCE Statutes: Their Application to Attorneys' Fees*, 19 J.L. REFORM 1199, 1201 n.13 (1986) (citing The Palmyra, 25 U.S. (12 Wheat) 1 (1827)). *In rem* forfeiture is a legal fiction, holding that the property itself is guilty of the crime. *Id.* at 1203. In a civil forfeiture proceeding, therefore, the property is forfeited at the time it is used to commit the crime. *Id.* Accordingly, any transfer of the property to a third party is void, since title vested in the government when the crime was committed. *Id.* Criminal forfeiture, however, is an *in personam* proceeding. The focus is on the person who committed the crime, not on the property. *Id.* at 1204. Traditionally, criminal forfeiture could not take effect until after a defendant's conviction. *Id.* Therefore, the title of the forfeitable property does not vest in the government until after conviction. *Id.* The issue in an *in personam* forfeiture proceeding is the guilt or innocence of the defendant. *Id.* Thus, a third party who receives forfeitable property from the defendant before his conviction cannot be punished for the defendant's crime. *Id.* at 1205.

Forfeiture as applied in the United States in civil and criminal proceedings has its roots in old English law, where a tenant could lose all his property to his lord due to a breach of fidelity. BLACK'S LAW DICTIONARY 585 (5th edition 1979). The eighteenth century English law of attainder also required that a defendant absolutely forfeit all his goods and chattels to the crown upon conviction for a felony or treason. United States v. Nichols, 841 F.2d 1485, 1486 (10th Cir. 1988) (citing Blackstone's Commentaries); Brickey, *supra*, at 493 n.1.

Even though criminal forfeiture was a feature of the common law at the beginning of the American republic, Brickey, *supra*, at 493 n.1, the Founding Fathers were hesitant to expand its use. *Nichols*, 841 F.2d at 1487. Concern about how forfeiture would effect a defendant's family and heirs led the First Congress to include anti-forfeiture provisions in Article III of the Constitution, while also prohibiting the forfeiture of a citizen's estate as a form of criminal punishment. *Id.* Until RICO and CCE, the only other time Congress enacted a criminal forfeiture statute was to punish Confederate soldiers after the Civil War. *Id.*

6. For an explanation of what types of property are forfeitable under RICO and CCE, see *infra* notes 40-42 and accompanying text.

7. For an explanation of how some courts have interpreted this to mean that attorneys' fees are not forfeitable under RICO and CCE, see *infra* notes 129-33, 142, 168-73, 186-93, 207-10, 213-236 and accompanying text.

8. United States v. Monsanto, 836 F.2d 74 (2d. Cir. 1987) (property defendant intended to use to pay his attorney is subject to forfeiture and property included in restraining order freezing defendant's assets). *See also* 56 U.S.L.W. 2367 (summary of *Monsanto* panel decision).

9. National Law Journal, Feb. 1, 1988, at 3, col. 1.

10. *Id.*

The use of RICO and CCE to reach property associated with crime also has a devastating effect on a defendant's sixth amendment rights.[11] RICO and CCE defendants may find it increasingly difficult to obtain counsel because many defense attorneys are unwilling to risk the forfeiture of their fees.[12] In addition, because the RICO and CCE forfeiture provisions include a pre-trial restraining order, a defendant may be unable to pay his attorney, even before conviction, out of funds possibly connected to a RICO or CCE offense.[13] Both statutes also contain provisions requiring the title of crime-related property to vest in the government at the time the crime was committed, rather than at the time of the defendant's arrest or indictment. This makes even attorneys' fees that are paid long before a charge exists subject to later forfeiture.[14] All of these scenarios will have an extremely detrimental effect on the attorney-client relationship.[15] In fact, use of the RICO and CCE forfeiture provisions to seize attorneys' fees creates a strong probability that many RICO and CCE defendants will not receive a fair trial at all.[16]

This comment first discusses the forfeiture provisions of RICO and CCE, and considers the congressional purpose in enacting and amending them. Second, this comment discusses how these forfeiture provisions interfere with a defendant's sixth amendment rights. Third, this comment analyzes the conflicting interpretations courts initially gave the amended statutes, and the faulty interpretations of both the language and legislative history of these forfeiture provisions. Fourth, this comment analyzes four recent decisions which reject the rationale of the initial RICO and CCE cases. These more recent cases generally agree that both the literal language and the legislative history of the statutes indicate that Congress intended attorneys' fees to be forfeitable. They disagree, however, on whether forfeiture of a defense attorney's fees violates the sixth amendment.

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11. The sixth amendment provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, . . . and to have the assistance of counsel for his defence." U.S. CONST. amend. VI. Courts have interpreted these constitutional guarantees to include the right to counsel, the right to counsel of choice, the right to effective assistance of counsel, and the right to a fair trial. For a further explanation of these sixth amendment rights, see *infra* notes 60-124 and accompanying text.

12. For an explanation of how attorney fee forfeiture affects the ability of defendants to retain counsel, see *infra* notes 60-86 and accompanying text.

13. For a detailed explanation of the pre-trial restraining order, see *infra* notes 54-59 and accompanying text.

14. This is known as the "taint theory," or the "relation back" doctrine. For an explanation, see *infra* notes 43-48 and accompanying text.

15. For an explanation of how RICO and CCE forfeiture affect attorney-client relations and the ethical responsibilities of attorneys, see *infra* notes 87-102 and accompanying text.

16. For an explanation of how RICO and CCE forfeiture hinders the right to a fair trial, see *infra* notes 103-124 and accompanying text.

Finally, this comment concludes that in most cases, a defendant's sixth amendment rights will outweigh the government's interest in preventing the spread of organized crime. The forfeiture provisions of RICO and CCE, therefore, should not apply to legitimate[17] attorneys' fees.[18]

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17. For a discussion of possible methods the courts might use to determine legitimate, or reasonable, attorneys' fees, see *infra* note 286.

18. *See generally*, Tracy, *RICO and the Forfeiture of Attorneys' Fees: Removing the Adversary from the Adversarial Systems?*, 62 WASH. L. REV. 201 (1987) (consideration of the legislative history and the sixth amendment does not adequately resolve the fee forfeiture issue; fifth amendment due process considerations indicate that potentially forfeitable assets can be applied to attorneys' fees); Note, *Against Forfeiture of Attorneys' Fees Under RICO: Protecting the Constitutional Rights of Criminal Defendants*, 61 N.Y.U. L. REV. 124 (1986)(fee forfeiture falls outside of the general legislative intent of RICO); Note, *The Criminal Forfeiture Provisions of the RICO and CCE Statutes: Their Application to Attorney's Fees*, 19 J.L. REFORM 1199 (1986) (attorneys' fees should be exempt from criminal forfeiture in the interest of due process and a criminal defendant's right to counsel); Note, *Criminal RICO: Forfeiture of Fees, Sixth Amendment Rights, and Attorney Responsibilities*, 21 U. RICH. L. REV. 589 (1987)(RICO should be amended to reflect Congress' actual intent—to uphold the sixth amendment right to counsel).

But see generally, Brickey, *Forfeiture of Attorney's Fees: The Impact of RICO and CCE Forfeitures on the Right to Counsel*, 72 VA. L. REV. 493 (1986) (Congress clearly intended fees to be forfeitable, and discussing procedures by which fee forfeiture will not violate sixth amendment rights); Fossum, *Criminal Forfeiture and the Attorney Client Relationship: Are Attorneys' Fees Up for Grabs?*, 39 SW. L.J. 1067 (1986)(concluding attorneys' fees are forfeitable, but governmental guidelines, if followed, ensure a defendant his sixth amendment rights); Comment, *Today's RICO and Your Disappearing Legal Fee*, 15 CAP. U.L. REV. 59 (1985)(advocating attorney fee forfeiture, but suggesting improvements in procedure to avoid harsh results); Note, *Forfeitability of Attorney's Fees Traceable as Proceeds from a RICO Violation Under the Comprehensive Crime Control Act of 1984*, 32 WAYNE L. REV. 1499 (1986)(concluding attorneys' fees should be forfeitable, but advocating amendments to pre-trial restraining procedures to protect sixth amendment rights); Note, *Forfeiture of Attorney's Fees Under RICO and CCE*, 54 FORDHAM L. REV. 1171 (1986)(attorneys' fee forfeitability raises constitutional problems, but threat to sixth amendment rights not fatal to the statutes).

See also Note, *Attorney Fee Forfeiture*, 86 COLUM. L. REV. 1021 (1986)(concluding that Congress did not intend to encompass attorneys' fees in forfeiture, but that the statutes, as written, can be interpreted that way); Note, *Forfeiture of Attorneys' Fees: A Trap for the Unwary* 88 W. VA. L. REV. 825 (1986) (admits the statutes apply to attorneys' fees, but argues that proper interpretation of the statutes will allow most attorneys to escape fee forfeiture).

In related issues, *see generally* Note, *A Critical Appraisal of the Justice Department Guidelines for Grand Jury Subpoenas Issued to Defense Attorneys*, 1986 DUKE L.J. 145 (1986)(discussing the use of subpoenas on defense attorneys and the effect this has on sixth amendment rights); Note, *RICO Post-Indictment Restraining Orders: The Process Due Defendants*, 60 N.Y.U. L. REV. 1162 (1985) (discussing the constitutional problems which arise under RICO's pre-indictment procedure for freezing a defendant's assets).

For an exhaustive list of current law review articles regarding attorney fee forfeiture under RICO and CCE, see United States v. Nichols, 841 F.2d 1485, 1490 n.3 (10th Cir. 1988).

I. THE FORFEITURE PROVISIONS OF RICO AND CCE

Congress enacted RICO and CCE in 1970. Both pieces of legislation sought to arm prosecutors with more effective weapons in the battle against organized crime.[19] Congress recognized that criminal organizations controlled and financially supported a nationwide network of criminal activity.[20] Congress also realized that the traditional criminal sanctions of fines and imprisonment are not enough to prevent the growth of organized crime because they do not affect the monetary strength of criminal empires.[21] Therefore, Congress designed RICO and CCE[22] to combat more than the individual criminal acts themselves, adding additional criminal penalties for participation in certain patterns of criminal activity.[23] More specifically, Congress sought to cripple criminal organizations by destroying their economic power base.[24] Congress therefore fashioned mandatory forfeiture provisions[25] that require any convicted RICO or CCE defendant to forfeit the profits of his crimes.[26] Congress' ultimate goal was to prevent giant criminal enterprises from corrupting legitimate business and trade.[27]

The original RICO forfeiture provisions[28] required any person who committed a RICO violation to forfeit any interest, control, asset or gain acquired through the illicit activity.[29] In practice, how-

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19. S. REP NO. 225, 98th Cong, 1st Sess. 191, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 3182, 3374-76 (outlining the original Congressional purpose in enacting RICO and CCE) [hereinafter S. REP.].

20. Note, *Against Forfeiture of Attorneys' Fees Under RICO: Protecting the Constitutional Rights of Criminal Defendants*, 61 N.Y.U.L. REV. 124, 124 n.2 (1986) (citing Statement of Findings and purpose, Organized Crime Control Act of 1970, reprinted in 1970 U.S. CODE CONG. & ADMIN. NEWS 1073). [hereinafter *Against Forfeiture*].

21. S. REP., *supra* note 19, at 3374.

22. For an explanation of the types of crimes prohibited under RICO and CCE, see *supra* note 4.

23. *Against Forfeiture*, *supra* note 20, at 124. Both statutes provided for heavy fines and prison terms. RICO, as originally enacted in 1970, allowed fines of $25,000 and up to 20 years imprisonment. 18 U.S.C § 1963(a) (1984). CCE contained provisions for fines ranging from $100,000 to $200,000 and prison terms from 10 years to life. 21 U.S.C. § 848(a) (1981).

24. United States v. McKeithen, 822 F.2d 310, 313 (2d Cir. 1987); *Against Forfeiture*, *supra* note 20, at 125; S. REP., *supra* note 19, at 3374.

25. 18 U.S.C. § 1963(b),(c) (1982). CCE did not include forfeiture penalties until the 1984 amendments. 21 U.S.C. § 848(a) (Supp. 1987).

26. *Against Forfeiture*, *supra* note 21, at 125.

27. Note, *Forfeitability of Attorneys' Fees Traceable as Proceeds from a RICO Violation Under the Comprehensive Crime Control Act of 1984*, 32 WAYNE L. REV. 1499 (1986).

28. CCE did not include any forfeiture provisions until the 1984 amendments. *See* Note, *Attorney Fee Forfeiture*, 86 COLUM. L. REV. 1021, 1023 (1986).

29. 18 U.S.C. § 1963 (a)(1),(2) (1984). After conviction, the court would authorize the government to seize all "property or other interest" forfeited under the statute. *Id.* § 1963(c). The Justice Department encouraged prosecutors to use the forfeiture provisions in every instance "where substantial forfeitable property exists and

ever, the application of the forfeiture provisions was haphazard at best. Prosecutors were unsure how to apply these provisions and, therefore, used them ineffectively.[30] Further, courts had difficulty interpreting exactly what specific kinds of property were forfeitable.[31] Finally, several built-in ambiguities and procedural loopholes permitted many defendants to frustrate legislative intent and avoid forfeiture altogether, either by effectively concealing their ill-gotten gains or by transferring them to third parties.[32]

The United States Supreme Court tried to clarify these statutory ambiguities in *Russello v. United States*.[33] The Court noted that the RICO statute did not specifically define its terms and that Congress would have expressly limited the scope of criminal forfeiture had it intended to do so.[34] The Court also concluded that Congress intended RICO to include "weapons of unprecedented scope" in the battle against organized crime,[35] and that limiting the scope of forfeiture would blunt RICO's effectiveness.[36] The Court, therefore, gave the RICO forfeiture provisions a broad and far-reaching interpretation.[37]

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there is a reasonable likelihood of success." Brickey, *supra* note 5 at 495 (quoting U.S. DEPT. OF JUSTICE, CRIMINAL FORFEITURES UNDER THE RICO AND CCE STATUTES (1980)).

30. For example, in the over 5000 drug related cases prosecuted by the federal government between 1970 and 1980, only 98 applied criminal forfeiture. United States v. Nichols, 841 F.2d 1485, 1487 (10th Cir. 1988). The potential intake from these 98 cases was $2 million, or about what the average heroin dealer made in a month. *Id.* (citing GENERAL ACCOUNTING OFFICE, ASSET FORFEITURE—A SELDOM USED TOOL IN COMBATTING DRUG TRAFFICKING ii (1981)); Note, *The Criminal Forfeiture Provisions of the RICO and CCE Statutes: Their Application to Attorneys' Fees*, 19 J.L. REFORM 1199, 1201 n.8 (1986) [hereinafter *Criminal Forfeiture*]; S. REP., *supra* note 19, at 3374.

31. S. REP., *supra* note 19, at 3374. Some courts held that only the direct interests of racketeering were forfeitable, not the profits. *See, e.g.*, United States v. Maruberi America Corp., 611 F.2d 763 (9th Cir. 1980). Other courts ruled that both direct assets and profits were forfeitable. *See, e.g.*, United States v. Martino, 681 F.2d 952 (5th Cir. 1982), *aff'd sub nom.* Russello v. United States, 464 U.S. 16 (1983).

Most courts interpreted RICO in light of the Federal Rules of Criminal Procedure and, therefore, required the indictment to allege forfeiture. The Federal Rules of Criminal Procedure require forfeiture to be alleged in the indictment, along with the extent of the interest or property which is forfeitable. FED. R. CRIM. P. 7(c)(2). The courts can only determine if forfeiture was valid upon conviction with a special verdict of forfeiture. *Id.* at 31(e)(outlining the requirement of a special verdict). Only after this special verdict can the government seize the defendant's property. *Id.* at 32 (b)(2)(conviction and the special verdict of forfeiture required before seizure).

32. *Against Forfeiture*, *supra* note 20, at 125.

33. 464 U.S. 16 (1983). *Russello* involved a group of Florida businessmen who committed arson with the intent to defraud insurance companies. *Id.* at 19. The defendant claimed that he was not involved in any "interest in an enterprise" as defined by RICO and, therefore, any profits gained through criminal activity were not forfeitable. *Id.* at 20.

34. *Id.* at 21-23.

35. *Id.* at 26.

36. *Id.* at 23-25.

37. *Id.* at 28 (forfeiture provision reaches "all property and interests, as broadly

While the Supreme Court was defining the scope of the RICO provisions in *Russello*, Congress was debating the inadequacies of RICO and CCE. Congress ultimately enacted the Comprehensive Forfeiture Act of 1984[38] in order to eliminate the weaknesses of the forfeiture provisions of RICO and CCE. The purpose of the new act thus mirrored *Russello's* purpose—to broaden the scope of property subject to forfeiture and to remove procedural obstacles that hindered the effectiveness of the provisions.[39]

The amended versions of RICO and CCE clarify the types of assets subject to forfeiture;[40] included are any interest, security, claim, or contractual right in any enterprise which violates either statute and in which the defendant has been involved.[41] The amendments state that *all* proceeds derived from the illegal enterprise are forfeitable.[42]

The amendments to RICO and CCE also provide for the title of forfeitable property to vest in the government at the time the criminal activity begins, rather than at time of conviction.[43] This objective, sometimes known as the "taint theory"[44] or the "relation back doctrine,"[45] nullifies any transfer of criminal proceeds to third parties, even if such parties are not involved in the criminal enterprise.[46] This doctrine prevents criminals from shielding forfeitable assets by making them appear to belong to someone else.[47] Several courts have classified attorneys as third parties under the statute and have used the relation back doctrine as the basis for the forfeiture of any funds a RICO or CCE defendant may have paid his attorney.[48]

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defined, which are related to the violations").

38. Pub. L. No. 98-473, Title III, §§ 301-323, 98 Stat. 2040 (amending 18 U.S.C. § 1963 and adding 21 U.S.C. § 853).

39. S. REP., *supra* note 19, at 3380-3404.

40. 18 U.S.C. § 1963 (a) (Supp. 1987); 21 U.S.C. § 853(a) (Supp. 1987).

41. 18 U.S.C. § 1963 (a)(2) (Supp. 1987); 21 U.S.C. § 853(a) (Supp. 1987).

42. 18 U.S.C. § 1963 (a)(3) (Supp. 1987); 21 U.S.C. § 853(a)(1) (Supp. 1987).

Property subject to forfeiture is broadly defined to include tangible and intangible property. 18 U.S.C. § 1963 (b) (Supp. 1987); 21 U.S.C. § 853(b) (Supp. 1987): "Property subject to criminal forfeiture . . . includes— (1) Real property, including things growing on, affixed to, and found in land; and (2) tangible and intangible personal property, including rights, privileges, interests, claims, and securities." *Id.*

43. 18 U.S.C. § 1963 (c) (Supp. 1987); 21 U.S.C. § 853(c) (Supp. 1987).

44. *Against Forfeiture*, *supra* note 20, at 128.

45. *Criminal Forfeiture*, *supra* note 30, at 1203.

46. *Against Forfeiture*, *supra* note 20, at 128. The Supreme Court hinted at this far-reaching forfeiture power in Russello v. United States, 464 U.S. 16, 28 (1983), when it suggested that future courts interpret RICO's forfeiture provisions as broadly as possible. Some pre-amendment cases had, in fact, suggested that the relation back doctrine should apply in RICO cases. *See, e.g.*, Simons v. United States, 541 F.2d 1351, 1352 (9th Cir. 1976).

47. United States v. Long, 654 F.2d 911, 916-17 (3d Cir. 1981); S. REP., *supra* note 19, at 3383-84.

48. *Against Forfeiture*, *supra* note 20, at 128.

While Congress intended to use the relation back doctrine to prevent sham transfers of forfeitable property,[49] it also recognized that some innocent third parties could be unfairly deprived of property which they received from a RICO or CCE defendant.[50] Therefore, Congress provided two statutory exceptions to the relation back doctrine.[51] First, if the third party actually owns the property at the time the crime is committed, or has superior title at that time, he is allowed to retain the property.[52] Second, if the third party can prove he was a bona fide purchaser for value and that he reasonably believed that the property was not subject to forfeiture at the time he purchased it, he may retain title to the property.[53]

Finally, Congress also added provisions which allow courts to issue pre-trial restraining orders to ensure that defendants will not dispose of their forfeitable property before conviction.[54] Congress noted that under the original forfeiture provisions, defendants were able to disperse their criminal assets before conviction.[55] To prevent this, Congress gave courts jurisdiction over all a defendant's forfeitable property, even if acquired prior to indictment.[56] Congress thus intended to close every loophole a racketeer or drug defendant might use to hide his assets from the court.[57] Such a restraining order, however, also prevents a RICO or CCE defendant from using his forfeitable assets to pay for an attorney,[58] and, in addition, also prevents his attorney from spending or transferring any fees already paid to him.[59]

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49. S. REP., *supra* note 19, at 3378, 3392.

50. *Id.* at 3391.

51. 18 U.S.C. § 1963 (l)(6) (Supp. 1987); 21 U.S.C. § 853(n)(6) (Supp. 1987).

52. 18 U.S.C. § 1963 (l)(6)(A) (Supp. 1987); 21 U.S.C. § 853(n)(6)(A) (Supp. 1987).

53. 18 U.S.C. § 1963 (l)(6)(B) (Supp. 1987); 21 U.S.C. § 853(n)(6)(B) (Supp. 1987).

54. 18 U.S.C. § 1963 (d) (Supp. 1987); 21 U.S.C. § 853(e) (Supp. 1987).

55. S. REP, *supra* note 19, at 3385. In fact, the normal procedure in a RICO case is for the Justice Department to inform a potential defendant that he is under investigation. This allows him to prepare his defense in anticipation of the grand jury proceedings. Under the old statute, it also allowed him ample time to dispose of all his forfeitable property. *Id.*

56. 18 U.S.C. § 1963 (d)(1)(B) (Supp. 1987); 21 U.S.C. § 853(e)(1)(B) (Supp. 1987). Under the common interpretation of the original statute, a court did not have jurisdiction over the forfeitable property until the defendant was convicted and a special verdict of forfeiture was entered against him. For an explanation, see *supra* notes 28-32 and accompanying text.

57. S. REP, *supra* note 19, at 3387.

58. Brickey, *supra* note 5, at 496.

59. *Id.* The court may also restrain the action of a defendant's agent in relation to forfeitable property. *Id.* at 496 n.16 (citing FED. R. CIV. P. 65(d), and pointing out that an attorney, as the defendant's agent, could be made an equitable trustee of the defendant's property if a restraining order is issued).

II. The Effect of RICO and CCE Forfeiture on Sixth Amendment Rights

The Right to Counsel

The sixth amendment guarantees all criminal defendants the right to representation by counsel.[60] The United States Supreme Court has recognized that because this right to counsel is a fundamental right,[61] an indigent defendant has an absolute right to court-appointed counsel.[62] The RICO and CCE forfeiture provisions, however, may seriously interfere with these rights.

One of the basic purposes of RICO and CCE is to discourage the commercial world from dealing with known racketeers and drug dealers.[63] The warning is clear: if a businessman decides to deal with criminals, he is on notice that he may lose all the money or property gained in that transaction.[64] No member of the business community is more aware of this fact than the attorney who is hired to defend a racketeer or dealer.[65] The RICO or CCE indictment usually triggers an involved and complicated case, requiring months of preparation before a lengthy trial.[66] Most, if not all, private criminal attorneys will hesitate to invest the time and effort needed for such a case if

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60. U.S. Const. amend VI. "In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defence." *Id.* The framers of the Constitution intended this right to be a basic principle of a humane society. Brickey, *supra* note 5, at 504 n.48 (citing the commentaries of former Justice Story).

61. Gideon v. Wainright, 372 U.S. 335, 342-45, 353, 356-58 (1963) (sixth amendment right to counsel is a fundamental right incorporated by the due process clause of the fourteenth amendment). Earlier decisions recognized an absolute right to counsel, but did not extend it beyond the jurisdiction of the federal courts. *See* Johnson v. Zerbst, 304 U.S. 458, 463 (1938)(indigent defendant in federal court has absolute right to appointed counsel); Powell v. Alabama, 287 U.S. 45, 68, 71 (1932)(recognizing historical connection between the right to a day in court to representation and the duty of a court to appoint counsel for an indigent capital defendant). The *Powell* decision, however, is based on fourteenth amendment due process grounds, rather than the sixth amendment. *Id.* at 71.

The right to counsel has also been extended to pretrial and post-trial proceedings where a defendant's rights may be adversely affected. Coleman v. Alabama, 399 U.S. 19 (1969)(right to counsel extended to pre-trial proceedings if absence of counsel will prejudice the defendant); Vela v. Estelle, 708 F.2d 954, 961 (5th Cir. 1983)(right to counsel extended to sentencing hearing).

62. Gideon v. Wainright, 372 U.S. 335, 342 (1963)(sixth and fourteenth amendments require appointment of counsel for all indigent felony defendants); Johnson v. Zerbst, 304 U.S. 458, 463 (1938)(sixth amendment requires appointment of counsel for indigent defendants in federal court); United States *ex rel.* George v. Lane, 718 F.2d 226, 231 (7th Cir. 1983)(court appointed counsel satisfies a state court's obligations under sixth amendment).

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

64. *Id.*

65. *Id.* (attorney on notice of the possibility of fee forfeiture as soon as client explains the case).

66. *Id.*

there is a real possibility of losing his fee.[67] Therefore, the defendant's practical ability to retain counsel is severely hampered by the forfeiture provisions of RICO and CCE.

The government has argued that, despite their chilling effect on potential defense counsel, the RICO and CCE forfeiture provisions do not violate the sixth amendment because the defendant can still acquire court appointed counsel.[68] However, only a defendant whom the court declares to be indigent qualifies for appointed counsel.[69] This creates a problem because a defendant will not be indigent if he prevails in the hearing that determines if a restraining order should be issued, or if he possesses sufficient assets that the court determines may not be connected to the charged crimes.[70] A defendant in this situation neither qualifies for an appointed attorney nor likely has any other attorney willing to take his case.[71] This chilling effect also hampers a defendant's efforts to obtain legal advice during a criminal investigation.[72] With court-appointed counsel not available until after the indictment,[73] a RICO or CCE defendant cannot obtain the advice of counsel on matters pertaining to his fundamental rights in the pre-trial setting.[74]

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67. *Id.* ("By the sixth amendment we guarantee the defendant the right to counsel, but by the forfeiture provisions of the RICO and CCE statute . . . we insure that no lawyer will accept the business").

68. *Against Forfeiture*, *supra* note 20, at 134.

69. *Id.*

70. United States v. Badalamenti, 614 F. Supp. 194, 197 (S.D.N.Y. 1985).

71. *Id.* The court stated that "[t]he wealthy defendant cannot claim poverty and apply for appointed counsel. His problem is not inability to pay a legal fee, but that lawyers will refuse to accept his retainer or refuse to represent him. He can get neither a paid lawyer or a free one." *Id. See Against Forfeiture*, *supra* note 20, at 134-35 (because it is within the court's discretion to appoint counsel, prosecution cannot stipulate that the defendant should qualify for appointed counsel as an argument for fee forfeiture). *But see* Brickey, *supra* note 5, at 513-15. (likelihood of defendant going to trial without counsel deemed slim).

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

73. *See* Coleman v. Alabama, 399 U.S. 1 (1970)(right to counsel applies at every critical stage of a criminal prosecution). *Coleman*, however, does not clarify what is "critical" and what pre-trial proceedings constitute a "criminal prosecution." In Brewer v. Williams, 430 U.S. 387 (1977), the Court established that "criminal prosecutions" may begin as early as the defendant's first appearance, or when the defendant is charged. *Id. Coleman* itself held that the critical period begins as early as the preliminary hearing. *Coleman*, 399 U.S. at 8-10. A court need not, however, require the appointment of counsel for an indigent defendant in a pre-trial *ex parte* proceeding. ALLEN & KUHNS, CONSTITUTIONAL CRIMINAL PROCEDURE 148 (1985). Because the right to counsel does not extend to the grand jury, Note, *A Critical Appraisal of the Justice Department Guidelines for Grand Jury Subpoenas Issued to Defense Attorneys*, 1986 DUKE L.J. 145, 162 (1986), and because the restraining order is an *ex parte* hearing, United States v. Thier, 801 F.2d 1463, 1469 (5th Cir. 1986), a RICO or CCE defendant will find it extremely difficult to retain counsel before the indictment. Also, because the defendant may prevail in the hearing on the restraining order, he may not qualify for appointed counsel after indictment either.

74. *Reckmeyer*, 631 F. Supp. at 1197 n.3.

The Right to Choice of Counsel

Another right that the RICO and CCE forfeiture provisions may violate is a defendant's sixth amendment right to retain his choice of counsel.[75] Although most lower federal courts only recognize a qualified right to choice of counsel,[76] a court can interefere with a defendant's choice of attorney only to protect an important government interest.[77] That is, the government may not interfere with the defendant's choice of attorney without demonstrating that the interference is necessary to ensure the efficient administration of justice.[78] For example, a court ordinarily cannot interfere with a defendant's right to choose counsel, but can prevent a defendant from abusing the right in an effort to manipulate the docket or delay the trial to his advantage.[79] Other situations where a court can legitimately interfere with the right to choice of counsel are when the defendant's chosen attorney has a conflict of interest[80] or where the chosen attorney is guilty of misconduct.[81] In general, however, when

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75. The text of the sixth amendment, however, is silent as to whether a defendant may demand a specific attorney. Brickey, *supra* note 5, at 504. In addition, the Supreme Court has never decided a case where the right to choice of counsel under the sixth amendment was the central issue. United States v. Nichols, 841 F.2d 1495, 1501 n.9 (10th Cir. 1988).

76. *See, e.g.*, United States v. Padilla, 819 F.2d 952, 956 (10th Cir. 1987); Linton v. Perini, 656 F.2d 207, 209 (6th Cir. 1981), *cert. denied*, 454 U.S. 1162 (1982) (right to choice of counsel is "basic [to the] trust between counsel and client, which is a cornerstone of the adversary system"). *See also* United States v. Bassett, 632 F. Supp. 1308 (D. Md. 1986) (defendant has the right to choice of counsel if he can afford it).

77. United States v. Phillips, 699 F.2d 798, 801-02 (6th Cir. 1983).

78. United States v. Burton, 584 F.2d 485 (D.C. Cir. 1978).

79. *See* United States v. Kelm, 827 F.2d 1319, 1320-21 (9th Cir. 1987) (court would not delay trial to allow defendant to obtain his choice of counsel); Urquhart v. Lockhart, 726 F. 2d 1316, 1319 (8th Cir. 1984) (affirming a qualified right to choice of counsel and the dismissal of a particular defense counsel); United States v. La Monte, 684 F.2d 672, 673-74 (10th Cir. 1982)(recognizing the right to replace counsel, but refusing continuance needed to find replacement); United States v. Johnston, 318 F.2d 288 (6th Cir. 1963) (reversing conviction because defendant not given time to retain counsel of choice); Releford v. United States, 288 F.2d 298, 310-312 (9th Cir. 1961)(reversing conviction where defendant's chosen attorney could not be at trial because continuance denied).

80. Brickey, *supra* note 5, at 509-10.

81. *Id.* at 510. In balancing the government's interest in judicial efficiency against the defendant's right to choose his attorney, courts have focused on whether a defendant has the right to a continuance to choose his attorney, either because he has not chosen an attorney already or because his chosen attorney is no longer available. *See* United States v. Burton, 584 F.2d 485 (D.C. Cir. 1978), *cert. denied*, 439 U.S. 1069 (1979). Courts traditionally focus on three factors in this balancing test: 1) the extent to which refusing continuance will affect the defendant's sixth amendment rights; 2) the public interest at stake; and 3) whether or not the defendant was at fault in creating the problem. *Id.* at 489-91. To support a denial of the continuance, the government must show something more than a rational reason for interfering with the right to choice of counsel. Note, *Attorney Fee Forfeiture*, 86 COLUM. L. REV. 1021, 1037 (1986).

Most cases addressing the choice of counsel problem deal with a defendant who

using the orderly administration of justice as the overriding government interest, it is usually difficult for the government to meet its burden of proof in denying a defendant's right to choice of counsel.[82]

The right to choice of counsel is also affected by the pre-trial restraining order. An indigent defendant, even one who is only constructively indigent due to a forfeiture restraining order, has almost no say in who his appointed attorney is.[83] With his assets frozen and the trial in progress, a RICO or CCE defendant will never be able to use his funds to pay for an attorney.[84] The verdict of forfeiture, however, which allows the government to actually seize the forfeitable assets, is not entered against the defendant until after conviction.[85] The jury could very well decide that the defendant is guilty of committing the RICO or CCE offense, but that the property in question is not connected with the crime. In that case, the frozen assets would not be subject to forfeiture. This raises the possibility that a court's pre-trial restraining order might prohibit a defendant from hiring the counsel of his choice with assets later proven to be his to spend all along.[86]

The Right to Effective Assistance of Counsel

The sixth amendment also guarantees a defendant the right to "effective assistance" of counsel.[87] Courts have interpreted this to mean that attorneys must represent defendants ethically and with a

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requests a change of counsel. Note, *Forfeiture of Attorney's Fees: A Trap for the Unwary*, 88 W. VA. L. REV. 825, 840 (1986). A defendant may request a change of counsel because of dissatisfaction with the attorney's services, because the attorney withdraws, *see, e.g., Burton*, 584 F.2d at 485 (attorney withdrew day before trial), or because the defendant discovers a conflict of interest. *See, e.g.*, United States v. James, 708 F.2d 40 (2d Cir. 1983)(cooperating witness and defendant, both under investigation for same offense, were represented by same law firm); United States v. Phillips, 699 F.2d 798, 799-800 (6th Cir. 1983)(defense attorney intended to call a witness he had previously represented in similar matter); United States v. Ostrer, 597 F.2d 337, 338-39 (2d Cir. 1979)(defendant's attorney had worked for the government on the very matter defendant was on trial for). Generally, the court will balance the defendant's concerns with the public's interest in a fair and orderly administration of the judicial system. *Against Forfeiture, supra* note 20, at 135. The court will seek to avoid any arbitrary interference with the defendant's wishes, but also will not allow the defendant to unreasonably use delay to his advantage. Urquhart v. Lockhart, 726 F.2d 1316, 1319 (8th Cir. 1984). Therefore, the courts have generally decided in favor of the government's interests if the need for the continuance was the defendant's fault. Note, *Attorney Fee Forfeiture*, 86 COLUM. L. REV. 1021, 1039 (1986).

82. *Against Forfeiture, supra* note 20, at 136.

83. United States v. Young, 482 F.2d 993, 995 (5th Cir. 1973); United States v. Calabro, 467 F.2d 973, 986 (2d. Cir. 1972), *cert. denied*, 410 U.S. 926 (1973).

84. Note, *Forfeiture of Attorneys' Fees: A Trap for the Unwary*, 88 W. VA. L. REV. 825, 840 (1986)[hereinafter *Trap*].

85. 18 U.S.C. § 1963 (e) (Supp. 1987); 21 U.S.C. § 853 (a) (Supp. 1987); Brickey, *supra* note 5, at 502.

86. Brickey, *supra* note 5, at 502 n.37.

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

reasonable degree of competence.[88] Several courts have stated that this right is based on the defendant's need to develop and maintain trust and openness in the relationship with his attorney.[89] Just as with the right to choice of counsel, the courts have not recognized an absolute right to effective assistance of counsel.[90] The RICO and CCE forfeiture provisions have a devastating effect on a defendant's right to effective assistance of counsel. No matter how courts characterize the importance of this right, RICO and CCE forfeiture effectively weaken, and often even destroy, the attorney-client relationship.

Attorney fee forfeiture causes several problems in maintaining the effective assistance of counsel. First, it has a chilling effect on attorney-client communications and relations.[91] Attorneys may avoid discussion of the client's fee sources to avoid the statutory notice provisions, and clients may hold back this information for fear of losing representation.[92] Also, because attorneys must testify at post-conviction hearings in order to establish the legitimacy of their fee,[93] and because attorneys have often been forced to testify before grand juries regarding the source of their fees,[94] the RICO and CCE

88. An attorney who acts incompetently is one who commits blatant errors. House v. Balkcom, 725 F.2d 608, 617-620 (11th Cir.), *cert. denied*, 469 U.S. 870 (1984). The courts, however, generally will not sanction an attorney for tactical decisions which happen to fail. Strickland v. Washington, 466 U.S. 668, 691 (1984).

The Supreme Court has only articulated a few ethical duties which an attorney owes to his client. These include a duty to act as a zealous advocate on the defendant's behalf, a duty to avoid conflicts of interest, a duty to keep the defendant informed of all important issues and developments during litigation, and a duty to represent the client in such a manner as not to hinder the adversarial process. *Strickland*, 466 U.S. at 688. *See also* Coles v. Peyton, 389 F.2d 224, 226 (4th Cir.), *cert. denied*, 393 U.S. 849 (1968) (counsel has duty to competently prepare for trial and to keep client adequately informed). The Court did not intend this list of duties to be exhaustive, but has required that each situation be reviewed in its totality to determine if the attorney has rendered effective assistance. *See Balkcom*, 725 F.2d at 615 (totality of any given situation must include quality of counsel's assistance from time of retention through the last appeal); Martin v. Maggio, 711 F.2d 1273, 1280 (5th Cir. 1983), *cert. denied*, 469 U.S. 1028 (1984)(seriousness of charges and totality of circumstances must be considered in ineffective assistance of counsel situations).

89. *See, e.g.*, Linton v. Perini, 656 F.2d 207, 212 (6th Cir. 1981), *cert. denied*, 454 U.S. 1162 (1982)("basic trust between counsel and defendant is the cornerstone of the adversary system and effective assistance of counsel"); Lee v. United States, 235 F.2d 219, 221 n.5 (D.C. Cir. 1956) ("relationship between attorney and client is highly confidential, demanding personal faith and confidence in order that they may work together harmoniously").

90. Morris v. Slappy, 461 U.S. 1, 13-14 (1983)(refusing to recognize that the sixth amendment guarantees a "meaningful attorney-client relationship").

91. For a discussion of the effect of fee forfeiture on the attorney client relationship, *see Against Forfeiture*, *supra* note 20, at 142-46; *Criminal Forfeiture* , *supra* note 30 at 1212-14; *Trap*, *supra* note 84, at 841-44.

92. United States v. Reckmeyer, 631 F. Supp. 1191, 1196 (E.D.Va. 1986); United States v. Rogers, 602 F. Supp. 1332, 1349 (D.Co. 1985).

93. 18 U.S.C. § 1963 (l) (Supp. 1987); 21 U.S.C. § 853 (n) (Supp. 1987).

94. For an explanation of how the government may use subpoenas to require

defense attorney may be forced to reveal information that will further implicate the defendant. All of these situations infringe on the attorney-client privilege.[95]

Second, possible fee forfeiture may affect an attorney's ethical conduct.[96] Because a RICO or CCE defendant's assets are subject to forfeiture, the attorney's ability to collect the fee will depend on whether the defense wins the case.[97] This may cause an attorney, understandably interested in assuring the collection of his fee, to compromise his commitment to the client.[98] In addition, the very existence of the forfeiture provisions encourages attorneys to take RICO and CCE criminal cases on a contingency basis, in violation of the Model Code of Professional Conduct.[99] An attorney representing a RICO or CCE client may also be tempted to negotiate a guilty plea to a non-RICO or non-CCE offense, rather than fight to exonerate the defendant and risk his legal fee.[100] Finally, because of the chilling effect forfeiture has on attorney-client communication, the RICO or CCE attorney may not be well-informed about his client's case; after all, learning about the source of the fee conflicts with the attorney's interest in collecting his fee.[101] Thus, while the United States Supreme Court has stated that a criminal defendant should

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defense attorneys to testify before the grand jury about their fees, see *infra* notes 106-117, 255-60, and accompanying text.

95. United States v. Badalamenti, 614 F. Supp. 194, 196 (S.D.N.Y. 1985); *Rogers*, 602 F. Supp. at 1349. The attorney-client privilege is a fundamental principle in our legal system. When a client seeks legal advice from an attorney and reveals information to the attorney in pursuit of that advice, the "communications revealing to that purpose" are made in confidence, and are protected. The attorney cannot reveal this information to anyone unless the client waives the privilege right. 8 J. WIGMORE, EVIDENCE § 2272 (1961). *See also* United States v. United Shoe Mach., 89 F. Supp. 357 (D. Mass. 1950); FED. R. EVID. 501. *See generally*, Note, *The Attorney Client Privilege: Fixing Rules, Balancing, and Constitutional Entitlement*, 91 HARV. L. REV. 464 (1977). While fee information is usually not considered privileged, *In re* Shargel, 742 F.2d 61, 62 (2d Cir. 1984), revealing the source of a RICO or CCE defendant's attorney fees could further incriminate him. This type of information would fall under the "communications revealing to that purpose" that Wigmore refers to.

96. For a discussion of how fee forfeiture creates conflicts of interests, *see Against Forfeiture*, *supra* note 20, at 140-42; Note, *Attorney Fee Forfeiture*, 86 COLUM. L. REV. 1021, 1030 (1986); *Criminal Forfeiture*, *supra* note 30, at 1212; *Trap*, *supra* note 84, at 844-45.

97. *Against Forfeiture*, *supra* note 20, at 140.

98. *See generally* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-101, EC 7-1 (1988)(describing the duty of an attorney to represent his client zealously).

99. The MODEL CODE OF PROFESSIONAL RESPONSIBILITIES DR 2-106(C) (1988), states: "A lawyer shall not enter into an arrangement for, charge, or collect a contingent fee for representing a defendant in a criminal case."

100. *Badalamenti*, 614 F. Supp. at 196; MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-101(A) (1988), states: "Except with the consent of his client after full disclosure, a lawyer shall not accept employment if the exercise of his professional judgment on behalf of his client will be, or reasonably may be affected by his own financial, business, property, or personal interest."

101. *Badalamenti*, 614 F. Supp. at 196.

be guaranteed an attorney who has no conflicts of interest,[102] the RICO and CCE forfeiture provisions would seem to create a conflict of interest in every case.

The Right to a Fair Trial

The Supreme Court also recognizes a criminal defendant's right to a fair trial. The sixth amendment, in particular, guarantees that the defendant will be tried before an impartial jury.[103] If the prosecution receives an unfair advantage over the criminal defendant, the adversarial system is destroyed[104] and "fair trial" becomes an anomaly. One example of how a federal court has construed the defendant's right to a fair trial in light of RICO and CCE forfeiture is *United States v. Badalamenti.*[105]

Badalamenti involved a defendant under investigation for possible violations of both RICO and CCE.[106] In order to determine if the legal fee was subject to forfeiture, the government sought to subpoena the defendant's attorney, forcing him to testify and produce documents relating to his fee.[107] The court quashed the subpoena,[108] citing as one important factor the effect such testimony would have on the defendant's ability to receive a fair trial.[109]

The prosecution sought revelation of fee information because it believed the fee paid to the attorney was inordinately high.[110] The prosecution theorized that evidence of a defendant paying his attorney a much higher fee than was customary would help prove that the money was derived from racketeering activity.[111] The court,

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102. Strickland v. Washington, 466 U.S. 668, 686 (1984); Cuyler v. Sullivan, 446 U.S. 335, 345-50 (1980).

103. U.S. CONST. amend. VI. "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . ." *Id.* This clause implies that if factors are present which will cause the jury to make anything but an impartial decision, the defendant's fundamental right to a fair trial has been violated. *See* United States v. Badalamenti, 614 F. Supp. 194, 199 (S.D.N.Y. 1985)(requiring an attorney to testify concerning his fee in a RICO proceeding would more than likely cause the jury to view the attorney as a criminal co-conspirator, making the jury predisposed to convict the defendant because of his attorney). The concept of a fair trial is also connected to fifth and fourteenth amendment due process rights. *See* Wardius v. Oregon, 412 U.S. 470, 474 (1973). Due process requires that there be a "balance of forces" between the defendant and his accusers. *Id.*

104. *See* United States v. Reckmeyer, 631 F. Supp. 1191, 1197 (E.D.Va. 1986)(potential prosecutorial abuse in CCE gives government a "tactical advantage"), *aff'd sub nom.* United States v. Harvey, 814 F.2d 905 (4th Cir. 1987), *rev'd sub nom. In re* Forfeiture Hearing as to Caplin & Drysdale, 837 F.2d 637 (4th Cir. 1988).

105. 614 F. Supp. 194, 199 (S.D.N.Y. 1985).

106. *Id.* at 195.

107. *Id.* at 195-96.

108. *Id.* at 201.

109. *Badalamenti*, 614 F. Supp. at 199.

110. *Id.* at 195.

111. *Id.*

while recognizing the relevance of such information, nevertheless held that the government could not force the attorney to testify.[112]

The court stated that revelation of this type of information could force the attorney to defend himself before the jury.[113] The jury might resent what they perceive to be an unreasonably high fee, viewing the attorney as an "unconscionable partner" in the defendant's alleged crime.[114] The attorney might then feel compelled to rebut such implications, putting his credibility before the jury.[115] These matters could distract the jury from issues that more properly should determine the outcome of the defendant's case.[116] When this occurs, the prosecution has unfairly tipped the judicial balance[117] by prejudicing the jury against the defendant's attorney.

Prosecutorial abuse is also a very real concern regarding the right to a fair trial.[118] Practically any felony indictment can be stated as a RICO cause of action.[119] Prosecutors could, therefore, easily use a RICO charge to force the withdrawal of a particular attorney.[120] Due to the incredible complexity of many RICO investigations, the government could virtually guarantee conviction through the well-timed disqualification of defense counsel.[121] Through the repeated use of these tactics, the government might be able to ensure that particular private attorneys will never represent RICO or CCE defendants.[122] To avoid such unfair results, the Justice Depart-

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112. *Id.* at 199.

113. *Badalamenti*, 614 F. Supp. at 199.

114. *Id.*

115. *Id.*, *citing* McArthur v. Bank of New York, 524 F. Supp, 1205, 1208 (S.D.N.Y. 1981) (attorney's veracity should not become an issue in the case because it may appear as if he has "compromised his integrity in order to prevail in the litigation").

116. *Badalamenti*, 614 F. Supp. at 199.

117. For an explanation of the judicial balance which the sixth amendment and fifth amendment due process require, see *supra* notes 77-82, *infra notes* 245-52 and accompanying text.

118. *See generally Against Forfeiture*, *supra* note 20, at 146-48 (suggesting that potential prosecutorial abuse under RICO is a threat to the adversary system); *Criminal Forfeiture*, *supra* note 31, at 1214-16 (discussing the potential for prosecutorial abuse under RICO and CCE).

119. *Against Forfeiture*, *supra* note 20, at 147. *See also* United States v. Rogers, 602 F. Supp. 1332, 1347 (D.Co. 1985).

120. For an explanation of how an attorney could be forced to withdraw due to RICO and CCE considerations, see *supra* notes 87-95, 113-14 and accompanying text. It is easy to imagine the prosecution adding a RICO charge to a pending criminal investigation, attaching a broad list of forfeitable assets, and informing the defendant's attorney that he is now on "notice". *See* United States v. Reckmeyer, 631 F. Supp. 1191, 1197 (E.D.Va.) *cert. denied*, 479 U.S. 850 (1986).

121. *Rogers*, 602 F. Supp. at 1349-50. The *Rogers* court pointed out that preparation for a grand jury proceeding in a complex RICO investigation could take as long as two to three years. *Id.* Even allowing court appointed counsel three to four months to prepare the case would be woefully inadequate. *Id.*

122. *Against Forfeiture*, *supra* note 20, at 148 nn. 53, 138 (citing an independent study that reveals many criminal defense attorneys *are* discouraged from repre-

ment has issued a series of guidelines for prosecutors to follow in seeking criminal forfeiture.[123] These guidelines set strict threshold requirements that must be met before prosecutors may seek attorney fee forfeiture; in addition, any such decisions are subject to Justice Department review.[124] However, the mere fact that the government felt such guidelines were necessary reveals the great potential for unfairness in applying criminal forfeiture to attorney fees.

III. The Initial Interpretations of RICO and CCE: Attempts to Protect Sixth Amendment Rights

Pre-amendment Interpretation

Before Congress amended RICO and CCE in 1984, courts generally interpreted the forfeiture provisions to include attorneys' fees.[125] Congressional intent pointed to broadening the scope of criminal forfeiture under the RICO and CCE amendments[126] and neither statute expressly exempted attorneys' fees from forfeiture.[127] Nothing in the amendments indicated that this interpretation of the statute would change.[128]

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senting RICO clients and that some feel they are targeted by the government to prevent them from taking such cases).

123. Department of Justice, U.S. Attorney's Manual § 9-111.530, reprinted in 38 Crim. L. Rep. (BNA) 3001 (Oct. 2, 1985).

124. *See* Brickey, *supra* note 5, at 536-37.

125. *See, e.g.*, Russello v. United States 464 U.S. 16 (1983)(RICO forfeiture provisions to be interpreted as broadly as possible); United States v. Turkette, 452 U.S. 576 (1981)("enterprise" as defined in RICO includes any funds derived from legitimate business infiltrated by racketeers, as well as funds derived from completely criminal entities); United States v. Lewis, 759 F.2d 1316, 1326-27 (8th Cir. 1985)(discussing effect of restraining order on defendant's right to choice of counsel and holding that since defendant did not choose any specific counsel, forfeiture provisions did not affect that right); United States v. Ray, 731 F.2d 1361, 1365-66 (9th Cir. 1984)(forfeiture provisions did not deny defendant the right to counsel or choice of counsel, although choice of counsel issue was avoided here because district court did appoint defendant's choice); United States v. Raimondo, 721 F.2d 476, 478 (4th Cir. 1983)(funds paid by defendant to attorney remain forfeitable in the attorney's hands); United States v. Long, 654 F.2d 911, 915-16 (3d Cir. 1981)(transfer of defendant's airplane to his attorney did not prevent jury finding that the airplane *was* subject to forfeiture); United States v. Bello, 470 F. Supp. 723, 725 (S.D.Ca. 1979)(restraining order preventing defendant from using personal funds to pay attorney of choice held to be constitutional).

126. S. Rep., *supra* note 19, at 3374-75.

127. United States v. Rogers, 602 F. Supp. 1332, 1347 (D.Co. 1985). The statutes only refer to transfers of property to third parties. *See* Note, *Criminal RICO: Forfeiture of Fees, Sixth Amendment Rights, and Attorney Responsibilities*, 21 U. Rich. L. Rev. 589, 594 (1987)(discussing pre-amendment cases). When viewed in light of the notice provisions, however, the amendments point to the conclusion that attorneys' fees are forfeitable. *Id.* at n. 36.

128. Note, *Criminal RICO: Forfeiture of Fees, Sixth Amendment Rights, and Attorney Responsibilities*, 21 U. Rich. L. Rev. 589, 594 (1987).

The Rogers *Case and Its Progney: A Flawed Attempt to Avoid Attorney Fee Forfeiture*

Beginning in 1985, however, some courts began to recognize the inherent sixth amendment problems which the 1984 amendments raised. *United States v. Rogers*[129] was the first case to deal with attorney fee forfeiture after the enactment of the RICO amendments.[130] The *Rogers* court scrutinized both the language of the statute and the legislative history of the amendments. The court concluded that although the statute was unclear in its treatment of assets transferred to third parties,[131] the legislative history[132] indicated that Congress intended attorneys to fit into the bona fide purchaser exception.[133]

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129. 602 F. Supp. 1332 (D.Co. 1985).

130. *Rogers* dealt with a RICO defendant and his attorneys who objected to a pre-trial restraining order preventing the transfer of the defendant's assets and moved to exclude attorneys' fees from forfeiture. *Id.* at 1334.

131. In examining the language of the statute, the court noted that because Congress included an exception for bona fide purchasers, it must have intended to treat assets transferred to third parties differently from assets retained by the defendant. *Id.* at 1347. The court went on to explain that the statute is not specific as to which assets are forfeitable after transfer to a third party. The phrase "at the time of purchase" is also unclear on its face. *Id.* (quoting 18 U.S.C. § 1963(a)). The statute also mentions nothing about the forfeiture of attorneys' fees. *Id.*

132. Examining the legislative history of the amendments, the court concluded that Congress intended forfeiture to apply to a defendant's transferred assets only if the transfer was part of "some type of sham or artifice." *Id.* The court determined that Congress only intended to have forfeiture reach a defendant's property, "in the instance where a transfer to a third party is voidable." *Id.* (quoting S. REP., *supra* note 19, at 3391). Congress intended to "close a potential loophole in current law whereby the criminal forfeiture sanction could be avoided by transfers which were not 'arm's length' transactions." *Id.* (quoting S. REP. *supra* note 19, at 3383-84). Noting that the intent behind the amendments was not to void legitimate transfers and sales to third parties, *Id.*, the court quoted a footnote to the Senate Report: "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.* (quoting S. REP., *supra* note 19, at 3392 n.47). In interpreting the Congressional intent behind the amendments, the *Rogers* court did not consider pre-amendment case law holding attorneys' fees forfeitable. The court acknowledged these decisions, but held either that they offered no insight into legislative intent or that they simply were not relevant. *Id.* at 1350. However, in deciding the constitutionality of entering the pre-trial restraining order, the court stated that, "[a]s a matter of statutory construction, I must interpret the [amendments] of 1984 under the presumption that Congress was aware of the case law interpreting §1963 before amendment. Unless it specified to the contrary, Congress intended to adopt the earlier case authority." *Id.* at 1343.

133. The court concluded that the fees of an attorney who performs legitimate legal services for the defendant, and does not participate in an attempt to hide the defendant's forfeitable assets, will not be subject to forfeiture. *Id.* at 1348. The court noted that an honest attorney is like any other bona fide purchaser who operates at arm's length from the defendant, rendering his services for value like any other businessman does. *Id.* at 1346, 1348. The only way an attorney's fee can be forfeitable is if it is part of a sham. *Id.* at 1348. The court also emphasized the fact that Congress did not want forfeiture to interfere with sixth amendment rights, *id.* at 1347-48, and included a lengthy analysis on how the forfeiture of attorneys' fees would detrimentally

The next court reviewing the 1984 amendments refused to follow *Rogers*. In re *Grand Jury Subpoena Duces Tecum Dated January 2, 1985*[134] (*United States v. Payden*), held that the forfeiture provisions did reach attorney fees, but did not violate the right to counsel.[135] The *Payden* court reasoned that RICO's relation back provision[136] means the fees paid to the attorney never belonged to the defendant.[137] Allowing attorney fee forfeiture thus serves the statute's purpose of preventing criminals from sheltering funds through third parties.[138] It also carries out the forfeiture provision's basic purpose of separating the criminal from his ill-gotten gain.[139] As for the choice of counsel issue, the court declared: "In the same manner that a defendant cannot obtain a Rolls-Royce with the fruits of a crime, he cannot be permitted to obtain the services of the Rolls-Royce of attorneys from these same tainted funds."[140] As long as appointed counsel is available, the defendant's sixth amendment rights are honored.[141]

The cases that followed *Rogers* and *Payden* were anything but consistent. While most of these decisions followed *Rogers* in spirit, many courts limited the attorney fee forfeiture exceptions to specific circumstances.[142] However, because there was no consensus on how

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affect those rights. *Id.* at 1348-51. However, the court also emphasized the need to uphold RICO's constitutionality, and held that as long as legitimate attorneys' fees are not subject to forfeiture, the amendments are constitutional. *Id.* at 1339, 1348, 1351.

134. 605 F. Supp. 839 (S.D.N.Y.), *rev'd on other grounds*, 767 F.2d 26 (2d Cir. 1985).

135. *Id.* at 849-50 n.14. The court upheld a subpoena that required the defense attorney to testify about his fee in order to determine if it was subject to forfeiture. *Id.* at 848. The court stated such a subpoena did not violate the defendant's right to counsel. *Id.*

136. For an explanation of the relation back provisions, see *supra* notes 43-48 and accompanying text.

137. *Payden*, 605 F. Supp. at 849-50 n.14.

138. *Id.* at 850 n.14. The problem with the *Payden* decision is there was no evidence offered to prove the attorney was part of any "money laundering" scheme.

139. *Id.*

140. *Id.* The weakness of *Payden*'s argument is that since the forfeiture issue is not settled until after conviction, neither is the issue of whether the defendant still has title to the assets he intends to use to pay his attorney. *Against Forfeiture*, *supra* note 20, at 129. The "Rolls-Royce" comparison also lacks merit. A car purchased with tainted funds can always be resold to support the criminal enterprise, while the legitimate services of an attorney have no resale value; such funds are useful only to the defendant, not the criminal organization. *Id.* While the intent to deprive criminals and criminal enterprises of the fruits of crime is accomplished in *Payden*, the regular infringement of sixth amendment rights through attorney fee forfeiture is a threat to the innocent as well as the guilty. *Id.* at 139-40.

141. *Payden*, 605 F. Supp. at 852-53 (sixth amendment guarantees the effective assistance of counsel, but not the choice of counsel). The *Payden* court also refused to recognize a bona fide purchaser exception for attorneys because any potential RICO attorney takes his fee with knowledge of the fee source. *Id.* at 849-50 n.14.

142. Two decisions from the Southern District of New York followed the *Rogers* rationale and held Congress did not intend to use criminal forfeiture to reach attor-

to apply the *Rogers* rationale, the various federal circuits developed

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neys' fees, but then limited this exemption from forfeiture to fees paid to the attorney before trial. United States v. Ianniello, 644 F. Supp. 452, 458 n.2, 459 (S.D.N.Y. 1985)(modifying a pre-trial restraining order allowed a defendant to pay the counsel of his choice, but distinguishing between pre- and post-indictment situations, and holding that a pre-trial restraining order violates the defendant's right to choice of counsel only until he is indicted and rendered indigent by a restraining order, at which time his right to counsel is preserved by appointed counsel); United States v. Badalamenti, 614 F. Supp. 194, 198 (S.D.N.Y. 1985) (limiting the exemption for fees already paid to the attorney),

The *Ianniello* court did not clearly state whether the government could rely on the provision of court-appointed counsel to avoid a violation of sixth amendment rights. Citing United States v. Bello, 470 F. Supp. 723, 725 (S.D.Cal 1979), the *Ianniello* court acknowledged that other courts had held that there was no distinction between defendants who were indigent due to life's circumstances and defendants made constructively indigent by the government. *Ianniello*, 644 F. Supp. at 459. Part of the problem with the clarity of the *Ianniello* decision is that the court did not reach the sixth amendment issue. *See Nichols*, 654 F. Supp. of 1552 (discussing *Ianniello*, 644 F. Supp. at 459). The appointed attorneys were the same as the defendant's choice, so the funds were released from the restraining order under the theory that attorneys' fees were a necessity of life. *Ianniello*, 644 F. Supp. at 459.

The *Badalamenti* court specifically distinguished between fees already paid and assets still in the possession of the defendant. *Nichols*, 654 F. Supp. at 1551. "Nor does this discussion apply to the seizure of funds *in the hands of the defendant* that he expects to use to pay his attorney." *Id.* (emphasis in original). Thus, the court refused to recognize the relation back provision, unless the fees were part of some sort of sham. *Badalamenti*, 614 F. Supp. at 198. This follows the *Rogers* holding that an attorney is a bona fide purchaser. The *Badalamenti* court also appeared to distinguish between pre-indictment and post-indictment forfeiture, suggesting that a post-indictment restraining order followed by the defendant's conviction could lead to the forfeiture of fees which the defendant possessed at the start of trial and intended to use to pay his attorney. *See Nichols*, 654 F. Supp. at 1551-52 (discussing *Badalamenti*, 614 F. Supp. at 198). Despite *Badalamenti's* strong attack on RICO's infringement of a defendant's sixth amendment rights, *Badalamenti*, 614 F. Supp. at 196-201, the end result is that the government may use a restraining order, cause the defendant to be indigent, and deny the defendant's right to choice of counsel. *See Nichols*, 654 F. Supp. at 1552 (discussing *Badalamenti*, 614 F. Supp. at 196-201).

Shortly thereafter, two district courts in the Fourth Circuit also chose to follow *Rogers*, but limited their decisions to the effects of final forfeiture orders on fees already paid to an attorney, not dealing with the issue of pre-indictment or pre-trial forfeiture. United States v. Bassett, 632 F. Supp. 1308, 1318 (D.Md. 1986)(prohibiting the government from seeking forfeiture of attorneys' fees "incurred and paid . . . for representation of . . . defendants against charges set out in the indictment . . .); United States v. Reckmeyer, 631 F. Supp. 1191, 1198 (E.D.Va. 1986)(ordering defendant's counsel to be paid out of funds already forfeited to the government). Both *Reckmeyer* and *Bassett* were consolidated with a third case on appeal in United States v. Harvey, 814 F.2d 905 (4th Cir. 1987), *rev'd sub nom. In re* Forfeiture Hearing as to Caplin & Drysdale, 837 F.2d 637 (4th Cir. 1988). Both courts agreed that attorneys' fees should be exempt from forfeiture. *Bassett*, 632 F. Supp. at 1317; *Reckmeyer*, 631 F. Supp. at 1195. Both decisions relied heavily on the same type of statutory analysis that *Rogers* employed. *Bassett*, 632 F. Supp. at 1317; *Reckmeyer*, 631 F. Supp. at 1195. However, because they were limited to considering final forfeiture orders, *Bassett* and *Reckmeyer* have no precedential value regarding the relation back provision.

A district court in the Seventh Circuit applied *Rogers* to both pre-trial and post-indictment situations, but relied on pre-amendment procedures. United States v. Estevez, 645 F. Supp. 869 (E.D. Wis. 1986). The court expressly followed the *Rogers* rationale, ruling that attorney's fees should be exempt from forfeiture. *Id.* at 871-72 (citing cases that follow *Rogers*; e.g., *Badalamenti*, *Bassett*, and *Reckmeyer*). The

many different interpretations of the forfeiture statutes.

Not only was *Rogers* interpreted inconsistently, closer scrutiny of the *Rogers* rationale itself reveals several problems.[143] First, the statutory language[144] defining what is forfeitable is not ambiguous.[145] In fact, several courts that followed the *Rogers* ruling admitted that the statutes, on their face, include the forfeiture of legal

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court extended the *Rogers* conclusion (that forfeiture only reaches sham transactions) to the pre-trial restraining order. *Id.* at 872. However, due to the fact that the *Estevez* court issued the restraining order while relying on pre-amendment procedures, *id.* at 870 (restraining order issued under 21 U.S.C. § 853 (e)(1)(A), a procedure in the pre-amended statute), the ruling may not have been justified. *Nichols*, 654 F. Supp. at 1553.

A later fifth circuit case relied on the provisions of the 1984 amendments, United States v. Thier, 801 F.2d 1463 (5th Cir. 1986), *modified*, 809 F.2d 249 (5th Cir. 1987), but did not extend the forfeiture exemption as far as *Rogers*. This court, while holding that the legislative history of the 1984 amendments does not require the exemption of attorneys' fees during the pre-trial period, decided to consider the sixth amendment ramifications of RICO and CCE on a case by case basis. *Id.* at 1468. The *Thier* court discussed the trial court's need to consider the important personal interests that a RICO or CCE defendant has. *Id.* The court held that the Federal Rules of Civil Procedure must be carefully complied with when issuing a restraining order to ensure that the trial court upholds the defendant's due process rights. *Id.* at 1468-70 (FED. R. CIV. P 65 must be carefully observed). The court then explained that, in considering the extent of the restraining order, the trial court must balance the defendant's genuine needs to pay for living expenses, including his attorney fees, against the government's interest in preventing a criminal from dispersing potentially forfeitable assets. *Id.* at 1471, 1475. While stating that exemption of fees was not mandatory, *id.* at 1471, the court noted that simply because an attorney has notice that the fees are potentially forfeitable, the trial court should not automatically include the fees in the restraining order. *Id.* at 1474. The court also stated that it was erroneous to use the forfeiture of attorney's fees as a means of preventing criminals from benefiting from their crimes, *id.*, and stated, "Expenditures the defendant must make to keep himself and his dependents alive and to secure competent counsel to prove his innocence or protect his procedural rights should not be considered incentives to crime." *Id.* at 1474-75.

143. For an explanation of the flawed reasoning of the *Rogers* court, *see generally* Brickey, *supra* note 5, at 499-503, 538-542; Note, *Forfeitability of Attorney's Fees Traceable As Proceeds From a RICO Violation Under the Comprehensive Crime Control Act of 1984*, 32 WAYNE L. REV. 1499, 1515-1517 (1986).

144. The threshold question in each of the cases following the *Rogers* rationale is one of statutory interpretation. Brickey, *supra* note 5, at 538.

145. The foundation of each of these rulings is the fact that RICO and CCE are allegedly ambiguous as to what exactly is forfeitable under the statutes. United States v. Estevez, 645 F. Supp. 869, 872 (E.D.Wis. 1986)("spirit of the statute," reasonably construed, exempts attorneys' fees); United States v. Bassett, 632 F. Supp. 1308, 1311 (D.Md. 1986)("statute is not clear on its face"); United States v. Reckmeyer, 631 F. Supp. 1191, 1195 (E.D.Va. 1986)(legislative history modifies broad statutory language); United States v. Ianniello, 644 F. Supp. 542 (S.D.N.Y. 1985)(plain language and legislative history "devoid of any explicit references" as to attorneys' fees); *Badalamenti*, 614 F. Supp. at 196 (literal reading of statute points to fee forfeiture, but Congress could not have meant it); *Rogers*, 602 F. Supp. at 1347 ("absence of clear statutory language"). *But see* United States v. Thier, 801 F.2d 1463, 1474 (5th Cir. 1986), *modified*, 809 F.2d 249 (5th Cir. 1987)(no indication that Congress intended to exempt attorneys' fees). None of these courts satisfactorily explained the ambiguity. Brickey, *supra* note 5, at 538-39.

fees.[146] Second, the conjunctive interpretation of legislative intent in *Rogers* is questionable[147] because the court misused quotations from the legislative history to create ambiguities where none existed.[148] Finally, the *Rogers* court's interpretation of the bona fide purchaser

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146. *See, e.g.*, United States v. Reckmeyer, 631 F. Supp. 1191, 1194 (E.D.Va. 1986) ("the forfeiture statute can be plainly read to encompass attorneys' fees"); *Badalamenti*, 614 F. Supp. at 196 ("a literal reading of the two forfeiture statutes would seem to encompass the legal fee").

The courts following the *Rogers* rationale have found the general language of the forfeiture provisions unclear simply because it does not specifically mention attorneys' fees. Brickey, *supra* note 5, at 538-39. This is not only absurd, but directly contradicts the Supreme Court's reasoning in *Russello*, which states that if Congress had intended to limit RICO and CCE it would have done so in the statute. These criminal forfeiture provisions, therefore, should be broadly defined. Russello v. United States, 464 U.S. 16, 28 (1983).

147. Brickey, *supra* note 5, at 500.

148. The *Rogers* court relied heavily on two quotations from the legislative history—one which expressed a desire to stop criminals from disposing of their ill-gotten property through transactions which were not at "arm's length", and another which, as cited by the court, appeared to reveal that Congress only intended forfeiture to apply to sham transactions. For the complete quotations and an explanation, see *supra* note 132. These quotations, however, were taken out of context. Brickey, *supra* note 5, at 500-502. It is obvious that Congress intended criminal forfeiture to stop the fraudulent transfers of forfeitable assets. The quotation dealing with prevention of non-"arm's length" transfers is from a section of the legislative history which decries the practice of "laundering" ill-gotten gains through third parties. S. REP., *supra* note 19, at 3383-84. Given the scope Congress wanted to give to the amended statute, the *Rogers* court's conclusion that forfeiture applies only to sham transfers is absurd. Brickey, *supra* note 6, at 501.

The *Rogers* court also based its conclusions on the legislative history of CCE, noting the House Judiciary Committee was concerned that criminal forfeiture not interfere with the right to counsel. *Rogers*, 602 F. Supp. at 1247 (committee emphasized that nothing in CCE forfeiture provisions was intended to interfere with right to counsel). However, the court misread these concerns by not quoting the next statement in the House Judiciary Committee report: "[We] therefore do not resolve the conflict in District Court opinions on the use of restraining orders that impinge on a person's right to retain counsel in a criminal case." Brickey, *supra* note 5, at 501 (quoting H.R. Rep. No. 85, part 1, 98th Cong., 2d Sess. 19 n.1 (1984)). With this additional statement, it is clear that while recognizing potential constitutional problems, Congress did not intend to solve them. Apparently, the House Judiciary Committee avoided this decision, leaving it up to the courts. *Id.* at 502.

The quotation regarding sham transactions is actually a misquotation. *Rogers*, 602 F. Supp. at 1347. The *Rogers* court inserted a bracketed word—[only]—into the quotation. *See supra* note 132 for the complete quotation. This insertion effectively changed a statutory requirement that had no limitations into one that was severely limited. Brickey, *supra* note 5, at 500. Instead of a statement emphasizing that third parties who participate in sham transactions should be excluded from an exemption, the statement, as the *Rogers* court quoted it, becomes one where an exemption must be granted in any non-sham transfer of assets. The surrounding text of the quotation clearly does not express this notion and, in fact, expresses congressional intent to strictly limit third parties who might gain exemption from the forfeiture provisions. *Id.*; S. REP., *supra* note 19, at 3392. After careful examination, it is the legislative history that is ambiguous, not the statutory language. United States v. Nichols, 654 F. Supp. 1541, 1555 (D. Utah 1987), *rev'd*, 841 F.2d 1485 (10th Cir. 1988). Contrary to the *Rogers* court's conclusions, there is no clear evidence that Congress sought to protect a defendant's sixth amendment rights or was concerned about attorneys' fees. *Id.* at 1556.

exception[149] is erroneous.[150] The nature of the attorney-client relationship makes it nearly impossible for an attorney to ever fit into the bona fide purchaser category.[151]

IV. 1987-1988: RE-EVALUATING *Rogers*, THE FEDERAL CIRCUITS FAIL TO AGREE ON THE CONSTITUTIONALITY OF ATTORNEY FEE FORFEITURE

Using the weaknesses of the *Rogers* rationale as a starting point, several writers have offered explanations of the statutes that would permit attorney fee forfeiture, but not interfere with a defendant's sixth amendment rights.[152] One writer has compared the RICO and CCE forfeiture provisions to the procedure at tax assessment trials.[153] These tax proceedings allow the government to enter a "levy" or "jeopardy assessment" against a defendant indicted for tax fraud.[154] This procedure, like a criminal forfeiture restraining order, is designed to prevent a tax defendant from dispersing assets to which the government has a claim.[155] It also effectively renders the defendant unable to pay for counsel of choice.[156] In tax proceedings, any protest that the right to choice of counsel is violated is deferred until after trial, since any real conflicts with that right exist only after conviction.[157] In additon, deferral of the issue may take care of the constitutional conflicts in other ways. For instance, a defendant

149. *Rogers* held that attorneys could keep their fees under the bona fide purchaser exception. *Rogers*, 602 F. Supp. at 1348.

150. While an attorney could easily establish that he accepted the case in good faith (believing in the defendant's innocence), he cannot overcome the notice requirement, Brickey, *supra* note 5, at 503, because notice of the indictment or charge imputes to the attorney knowledge of potential forfeiture. *Rogers*, 602 F. Supp. at 1346-47.

151. A bona fide purchaser is one who buys something of value without any knowledge of potential defects. BLACK'S LAW DICTIONARY 161 (5th ed. 1979). The very nature of an attorney's fiduciary duty to a criminal defendant removes him from the "arm's length" category. He will always have knowledge of his fees' "potential defects". Brickey, *supra* note 5, at 503.

152. *See, e.g.*, Brickey, *supra* note 5, at 529-542 (sixth amendment concerns may be raised after conviction); Fossum, *Criminal Forfeiture and the Attorney-Client Relationship: Are Attorneys' Fees Up for Grabs?* 39 SW. L.J. 1067, 1091 (1986)("governmental discretion" avoids constitutional conflicts); Note, *Forfeitability of Attorneys' Fees Traceable as Proceeds From a RICO violation under the Comprehensive Crime Control Act of 1984*, 32 WAYNE L. REV. 1499, 1519-20 (1986)(separate hearing on forfeiture issue should solve constitutional problems); Note, *Forfeiture of Attorney's Fees Under RICO and CCE*, 54 FORDHAM L. REV. 1171, 1193 (1986)(constitutional problems of criminal forfeiture not fatal to the statues); *Trap*, *supra* note 84, at 848. (RICO and CCE's constitutional problems can be overcome through court interpretation).

153. Brickey, *supra* note 5, at 525-530.

154. *Id.* at 525-28 nn.126-150 and accompanying text (citing tax code, cases, and articles relating to asset freezing in tax assessment settings).

155. *Id.*

156. *Id.*

157. *Id.* at 530 (courts in this area only address the right to choice of counsel when it becomes real issue, refusing to consider it speculatively in pre-trial setting).

may be able to borrow money after the start of trial[158] or may be able to locate a less expensive lawyer.[159] Another suggested alternative to the *Rogers* approach is to hold a separate forfeiture hearing after the indictment to ensure that the court is not arbitrarily freezing the defendant's assets.[160] Still other writers thought that the Justice Department guidelines,[161] if observed, would eliminate any conflict with the sixth amendment.[162]

As legal scholars debated how to interpret the forfeiture provisions of RICO and CCE, four cases arising in separate federal circuits during late 1987 and early 1988 gave federal courts an opportunity to reinterpret RICO and CCE forfeiture.[163] While one circuit chose to follow *Rogers*,[164] the other three rejected the *Rogers* rationale, holding that the statutory provisions are clear on their face and that the legislative history sheds no clear light on congressional intent.[165] This initial conclusion, however, is where the similarity ends.

In the first case, *United States v. Nichols*,[166] the Tenth Circuit concluded that attorneys' fees are not exempt from forfeiture under RICO or CCE.[167] The district court had held that the statutory provisions clearly encompass attorneys' fees,[168] but that such a statute violates a defendant's sixth amendment right to choice of counsel.[169]

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158. Brickey, *supra* note 5, at 530.

159. *Id.* at 531.

160. Note, *Forfeitability of Attorney's Fees Traceable as Proceeds from a RICO Violation Under the Comprehensive Crime Control Act of 1984*, 32 WAYNE L. REV. 1499, 1519-20 (1986).

161. For an explanation of the Justice Department guidelines, see *supra* notes 123-124 and accompanying text.

162. Brickey, *supra* note 5, at 536-38.

163. United States v. Monsanto, 852 F.2d 1400 (2d Cir. 1988); United States v. Nichols, 841 F.2d 1485 (10th Cir. 1988); United States v. Jones, 837 F.2d 1332 (5th Cir. 1988); *In re* Forfeiture Hearing as to Caplin & Drysdale, 837 F.2d 637 (4th Cir. 1988).

164. *Jones*, 837 F.2d at 1334.

165. *Monsanto*, 852 F.2d at 1402-12 (*per curiam* opinion states that attorney fees should be exempt from forfeiture, but none of the concurring opinions follows *Rogers*); *Nichols*, 841 F.2d at 1491-96 (statutory construction and legislative intent clearly indicate attorneys' fees are forfeitable); *Caplin*, 837 F.2d at 641-42 (statutory language is unambiguous, while legislative history is broad in defining what is forfeitable). The district court in *Caplin* agreed with the *Rogers, Reckmeyer, Bassett*, and *Badalamenti* courts in stating that it is extremely hard to believe that Congress intended forfeiture to extend to attorneys' fees, but that a clear examination of the legislative history nonetheless reveals that Congress did intend such a result. United States v. Harvey, 814 F.2d 905, 914, 917 (4th Cir. 1987), *rev'd sub nom. In re* Forfeiture Hearing as to Caplin & Drysdale, 837 F.2d 637 (4th Cir. 1988).

166. 841 F.2d 1485 (10th Cir 1988).

167. *Id.* at 1509.

168. United States v. Nichols, 654 F. Supp. 1541, 1556 (D.Utah 1987), *rev'd*, 841 F.2d 1485 (10th Cir. 1988).

169. *Id.* at 1558-59. The *Nichols* district court, balancing the effective administration of justice with the defendant's right to counsel, held that the government did not meet its burden of proof, because denying the defendant his choice of counsel impedes the orderly progress of the trial. *Id.* at 1558. Balancing the statutory purpose

The district court rejected the analogy of criminal forfeiture to tax fraud cases.[170] It also refused to accept the availability of appointed counsel as the answer,[171] noting that the government will pay one way or the other—either by providing counsel or exempting the forfeitable fee. The court reasoned that it is better to use the method which will not infringe on a defendant's fundamental rights or his presumption of innocence.[172] The district court, therefore, ordered an exemption (from assets otherwise subject to forfeiture) for the defendant's payment of reasonable attorney's fees.[173]

The Tenth Circuit reversed.[174] Because the appellate court agreed that both the statutory language and legislative history were clear,[175] it could find no logical way to interpret the forfeiture provisions to exclude attorneys' fees. The statute as written only makes exceptions for transactions in which the third party has no knowledge of possible forfeiture.[176] The court also noted that to exempt attorneys' fees from forfeiture would undermine the general purposes of the statute—to destroy the power base of organized crime and to increase the possibility that the assets be preserved for forfei-

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of criminal forfeiture with the defendant's right to counsel yields similar results. *Id.* The court held that the basic purpose of criminal forfeiture is to separate criminals from the economic fruits of their crimes. *Id.* Exempting attorneys' fees from the restraining order does not thwart this purpose. *Id.* The court noted that a defendant's use of any assets to pay for counsel should not be viewed as a motivation to commit crime. *Id.*(quoting United States v. Thier, 801 F.2d 1463, 1474 (5th Cir. 1986), *modified*, 809 F.2d 249 (5th Cir. 1987)). The court also held that the defendant's interest in the attorney-client relationship outweighed the statutory interest. *Id.*

170. *Id.* at 1557-58. The government relied on United States v. Brodson, 241 F.2d 107 (7th Cir.), *cert. denied*, 354 U.S. 911 (1957). *Brodson* dealt with a defendant on trial for filing fraudulent tax returns. The accompanying tax lien filed against him made him constructively indigent, just as a restraining order does in a RICO or CCE setting. *Nichols*, 654 F. Supp. at 1557. The court denied the defendant's motion to dismiss on the grounds his sixth amendment right to effective assistance of counsel was violated because the trial had not yet taken place and effective assistance problems can only be evaluated after a trial. *Id.* The court therefore ruled that the defendant could only raise such an issue on appeal after trial. *Id.*

The *Nichols* court pointed out, however, that *Brodsen*, although providing for a post-trial solution to sixth amendment problems, dealt with effective assistance of counsel, not the right to choice of counsel. *Id.* at 1557. In addition, a tax levy proceeding is *in rem*, not *in personam*, as are RICO and CCE forfeiture proceedings. *Id.* The purpose of a tax lien is to collect monies owed, while the purpose of criminal forfeiture is punishment. *Id.* The court therefore concluded that tax fraud cases and criminal forfeiture are distinguishable. *Id.*

171. In countering the government's claim that the defendant had appointed counsel available, the *Nichols* court stated that but for the government's actions, the defendant could pay his chosen attorney. *Id.* at 1559. As long as the fee arrangement is legitimate, the paying of attorney's fees does not contribute to the crime—it merely ensures the defendant an adequate defense. *Id.*

172. *Id.*

173. *Id.* at 1559.

174. United States v. Nichols, 841 F.2d 1485, 1509 (10th Cir. 1988).

175. *Id.* at 1492-93.

176. *Id.* at 1494. This effectively negated the argument that fee forfeiture should only apply to sham transactions. *Id.*

ture after conviction.[177] The Tenth Circuit concluded that allowing a defendant to use forfeitable assets for *any* purpose violates the statute's legislative intent.[178]

Even after considering the sixth amendment issues, the *Nichols* court held that attorneys' fees are subject to forfeiture.[179] The court stated that the right to choice of counsel was simply not strong enough when balanced against the important public interest in "stripping defendants of the economic power they derive from illegal activity"—such power including, of course, the ability to hire expensive, expert counsel.[180] As long as the defendant can obtain an attorney, the court reasoned, the sixth amendment has not been violated.[181] The court admitted that the forfeiture provisions create

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177. *Id.* at 1494-95. The Tenth Circuit also noted that Congress, under 18 U.S.C. § 3671(a) (Supp. 1984) (federal law providing for forfeiture of profits gained when criminal sells media rights for depictions of his crime), *expressly exempted* attorneys' fees. *Nichols*, 841 F.2d at 1496. Because the media rights statute and the RICO/CCE amendments were passed in the same year, and because one expressly exempts legal fees while the other does not, the *Nichols* court concluded that Congress must have meant to include attorneys' fees in RICO and CCE.

178. United States v. Nichols, 841 F.2d 1485, 1495 (10th Cir. 1988) (congressional directive is "crime should not pay").

179. *Id.* at 1496-1509.

180. *Id.* at 1505 (citing *In re* Forfeiture Hearing as to Caplin & Drysdale, 837 F.2d 637, 649 (4th Cir. 1988)). The *Nichols* court first stated that the restraining order and relation-back provision were proper, noting that the government is allowed to use methods which adversely affect criminal defendants before trial if it is necessary to protect a public interest. *Id.* at 1500. Courts are allowed to restrain defendants before trial begins, or force the defendant to post bail in order to protect community safety and enhance crime prevention. *Id.* at 1501. Restraining a defendant's forfeitable property will also prevent the defendant from using the fruits of his crimes " 'on wine, women, and song before his conviction and having dissipated his interest in the profits,' leaving nothing to forfeit." *Id. quoting* United States v. Alexander, 741 F.2d 962, 968 (7th Cir. 1984), *overruled*, United States v. Ginsburg, 773 F.2d 798 (7th Cir. 1985), *cert. denied*, 475 U.S. 1011 (1986). While the court admitted that it might freeze the assets of an innocent defendant and, therefore, preclude that defendant from hiring the attorney of his choice, it noted that the possibility of a guilty defendant using the fruits of his crimes to secure counsel was the least desirable alternative, and certainly not what Congress intended. *Id.*

The court also noted that the sixth amendment right to choice of counsel is not absolute and that a court may restrict a defendant's right to choice of counsel if it would not adversely affect an important public interest. *Id.* at 1502. The court listed several reasons why a court might not allow the defendant to choose his counsel, *Id.* at 1503-04 (non-attorneys, attorneys not admitted to the bar, disbarred attorneys, and attorneys who would make timely litigation difficult are all examples of counsel that the court would have a valid reason to deny to the defendant). The court held that as long as the decision to disallow choice of counsel is not arbitrary, the government can do so. *Id.* at 1504. Under this congressional mandate, interfering with the right to choice of counsel is not necessarily arbitrary, and, therefore, the defendant has no absolute right to use the assets in his possession to obtain an attorney. *Id.*

181. The *Nichols* court refused to recognize that a defendant with frozen assets will be unable to select or retain private counsel. *Nichols*, 841 F.2d at 1505. The court identified four possible ways that a constructively indigent defendant could still obtain adequate counsel: 1. The defendant could use assets in his possession not subject to forfeiture; 2. The defendant could assign his claim to the property subject to forfeiture to the attorney; 3. The defendant could depend on financial assistance from fam-

potential ethical conflicts and an opportunity for prosecutorial abuse,[182] but refused to strike down the law merely because there is the potential for a conflict with the defendant's constitutional rights.[183]

The second case, In re *Forfeiture Hearing as to Caplin & Drysdale*,[184] also reversed a ruling that exempted attorneys' fees from forfeiture.[185] *Caplin* reversed *United States v. Harvey*,[186] a case in

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ily or friends; and 4. If financially unable to pay for counsel due to the restraining order, the defendant could have the government appoint counsel. *Id.* at 1505-06.

Each of these methods of providing constitutionally acceptable alternatives to a defendant's right to choice of counsel has its problems. While a defendant with clearly identifiable non-forfeitable assets can use such funds to pay his attorney, many RICO defendants are career criminals whose personal finances are probably intimately connected with criminal activity. An attorney who receives an assignment of rights to the forfeitable property runs the risk of violating the ethical proscription against taking criminal cases on a contingency basis. *See supra* notes 87-102 and accompanying text for a discussion of the ethical problems connected with attorney fee forfeiture. Relying on friends and family is probably an unrealistic alternative.

The use of appointed counsel in RICO and CCE forfeiture settings has been a point of contention for some time. Some courts have held that public defenders lack the resources and expertise to properly represent RICO and CCE defendants. *See, e.g.*, United States v. Rogers, 602 F. Supp. 1332, 1349 (D.Co. 1985). Because RICO and CCE cases are so complex, lengthy, and expensive, appointed counsel may lack the expertise to do an adequate job. *Nichols*, 841 F.2d at 1507 (citing *Rogers*, 602 F. Supp. at 1349-50 n.23). Public defenders are generally overworked, and may not be able to handle the volume of work that RICO or CCE actions entail. United States v. Monsanto, 836 F.2d 74, 86 (2d Cir. 1987) (Oakes, J. dissenting), *vacated*, 852 F.2d 1400 (2d Cir. 1988); *Rogers*, 602 F. Supp. at 1349. A public defender's pay may not be enough to justify this kind of time and effort. *Nichols*, 841 F.2d at 1507 (citing United States v. Estevez, 645 F. Supp. 869, 871 (E.D.Wis. 1986)). *But see id.* at 1507 n.13 (Criminal Justice Act allows public defenders higher fees in complex cases). Appointed counsel is not available until after the defendant is formally charged, making it difficult, if not impossible, for a RICO or CCE defendant to obtain counsel before he is indicted. *See supra* notes 70-74 and accompanying text. The jury might be prejudiced against a defendant with appointed counsel. Note, *Forfeiture of Attorneys' Fees: Should Defendants Be Allowed to Retain the "Rolls Royce of Attorneys" with the "Fruits of the Crime"?*, 39 STAN. L. REV. 663, 677 (1987). *See supra* notes 103-124 and accompanying text for other ways attorney fee forfeiture can affect the fairness of the trial. The *Nichols* court, however, refused to acknowledge these criticisms, noting that many public defenders are very experienced and exceptionally qualified to handle these cases. *Nichols*, 841 F.2d at 1507. Courts consider appointed counsel to be adequate for indigents accused of murder. *Id.* It is therefore difficult to conclude that the same type of attorney is unqualified to represent a racketeer with millions in frozen criminal assets. *Id.*

182. *Nichols*, 841 F.2d at 1508. *See supra* notes 87-124 and accompanying text for a discussion of those potential conflicts and abuses.

183. *Nichols*, 841 F.2d at 1508-09.

184. 837 F.2d 637 (4th Cir. 1988).

185. *Caplin* was an *en banc* rehearing of United States v. Harvey, 814 F.2d 905 (4th Cir. 1987). The *Caplin* case is actually United States v. Reckmeyer, 631 F. Supp. 1191 (E.D.Va. 1986), *aff'd sub nom.* United States v. Harvey, 814 F.2d 905 (4th Cir. 1987). The Fourth Circuit had consolidated the *Reckmeyer* case with two similar decisions in the *Harvey* case, and the court upheld the exemption of attorney's fees from forfeiture in each case. *Caplin* is an *en banc* rehearing of the *Reckmeyer* appeal only.

The *Harvey* ruling explicitly confined its holding to the choice of counsel issue.

which the Fourth Circuit reviewed an order forfeiting the attorneys' fees of a CCE defendant.[187] Balancing the government's interest in preserving the defendant's property for forfeiture against the defendant's sixth amendment rights, the *Harvey* court had concluded that although Congress intended RICO and CCE authority to reach further, only sham or fraudulent transfers of funds to an attorney are constitutionally forfeitable.[188]

The *Harvey* court based this conclusion on several analytical prongs. First, if the government's assertion about the adequacy of appointed counsel is true, the forfeiture provisions would essentially take an entire class of criminal defendants and completely deny them the right to choice of counsel,[189] ensuring them only a minimal right to effective assistance of counsel.[190] Second, because the right to counsel was designed to protect both the guilty and the innocent, a guilty defendant's use of even ill-gotten assets is an established part of our legal system and is a result that the framers of the Bill of Rights must certainly have expected.[191] Third, the court noted that the defendant's interest in having a sufficiently informed and equipped attorney is fundamental to the adversary system.[192] However, because the statutory notice provisions undercut this right, the defendant has effectively lost the right to choose such an attorney.[193]

In reversing *Harvey*, the fourth circuit took a strong stance in

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Id. at 922. *Harvey* did recognize the vital importance of the other sixth amendment rights, however, and explained the issues involving the absolute right to counsel, the right to effective assistance of counsel, and the right to fair trial. *Id.* at 920-22. As in the lower court's decision in *Nichols*, *Harvey* rejected deferment of the sixth amendment issues until after the trial, a procedure used in tax fraud cases. *Id.* at 926. The *Harvey* court noted that the relation back provision distinguished RICO and CCE from tax assessment. In criminal forfeiture, the government has no interest in the defendant's property until a crime is committed. In tax fraud cases, the government is seizing what has always rightfully belonged to it. *Id.* at 926. The government interest which is balanced against the right to choice of counsel in tax fraud situations is therefore greater than the government interest at stake in criminal forfeiture. *Id.* *Harvey* also agreed with the district court ruling in *Nichols* when it concluded that the basic purpose behind RICO and CCE forfeiture was to keep the defendant's property available for forfeiture and to deprive the criminal of his economic power base. *Id.* at 924 (quoting S. REP., *supra* note 19, at 3374, 3378-79).

186. 814 F.2d 905 (4th Cir. 1987).

187. *Id.* at 908.

188. *Id.* at 927.

189. *Id.* at 924.

190. *Id.* at 925-26. Also, because questions of ineffective counsel cannot be raised until after trial, the question of whether the appointed attorney was as competent as the attorney of choice is rendered moot. *Id.*

191. *Id.* at 924-25.

192. *Id.* at 925.

193. *Id.* The court emphasized that this did not violate the right to effective assistance of counsel—but rather the right to choice of counsel—ostensibly due to the fact that because the notice provision guarantees that the defendant will only have ineffective counsel available to him, even if he could pay his attorney, these notice provisions deny him a choice in the matter. *Id.*

favor of attorney fee forfeiture. In fact, the *Caplin* court bluntly stated that "there is no established sixth amendment right to pay an attorney with the illicit proceeds of drug transactions."[194] The court agreed with the *Harvey* rationale as far as legislative intent is concerned.[195] It refused, however, to interpret the sixth amendment as requiring the limitation of attorney fee forfeiture to sham transfers.[196]

Addressing the sixth amendment concerns that the law firm raised, the *Caplin* court dismissed any notion that forfeiture affects the absolute right to counsel because appointed counsel is always available.[197] Although admitting that appointed counsel may not always be as qualified as the defendant's choice, the court noted that equality of representation is beyond the realm of the sixth amendment's protection.[198] In fact, the court stated that the right to choice of counsel was not even at issue because the assumption in every case dealing with choice of counsel is that the defendant wishes to hire an attorney with his own assets.[199] Due to the relation back provision, however, the assets in question do not belong to the defendant.[200]

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194. *Caplin*, 837 F.2d at 640.

195. *Id.* at 641.

196. *Id.* at 642. The court stated that limiting fee forfeiture to sham transfers effectively eliminates the bona fide purchaser exception because an attorney who has notice of potential forfeiture would be able to skirt the requirements due to the legitimacy of the work he was doing on the defendant's behalf. *Id.* The *Caplan* court held that if Congress had intended such a result, the statutory language would reflect it. *Id.*

197. *Id.* at 643. The court addressed the concerns regarding pre-trial representation by comparing them with pre-trial restraints on liberty. *Id.* These restraints must be imposed in accordance with the restrictions of due process. *Id.* However, just as a defendant does not have an absolute right to keep himself and his property free of lawful searches and seizures under the fourth amendment, *id.* at 643-644, a defendant cannot demand the absolute right to an attorney pre-trial—provided that the deprivation of sixth amendment rights are not violative of due process. For an explanation of when sixth amendment rights extend to the pre-trial setting, see *supra* note 73. The *Caplan* court did not deny that a sixth amendment right to counsel problem might arise under to RICO and CCE forfeiture. It did, however, state that the mere existence of a possible deprivation of rights should not lead to a per se rule exempting attorneys' fees. Any claim regarding such matters must relate to the procedures involved. The *Caplan* appellants made no such due process challenge. *Id.* at 647-48.

198. *Id.* at 645 (citing Morris v. Slappy, 461 U.S. 1, 23 (1983) (Brennan, J., concurring)). A defendant with his own funds can hire an attorney up to the limit those funds will allow. Those without assets—and, in the *Caplin* court's estimation, this includes RICO and CCE defendants—have to settle for appointed counsel. *Id.* Choice of appointed counsel for these defendants is, in general extremely limited. *Id.*(citing Tague, *An Indigent's Right to the Attorney of His Choice*, 27 STAN. L. REV. 73 (1974)).

199. *Id.*

200. *Id.* The *Caplan* court also accepted the comparison of RICO and CCE restraining orders with tax levies and jeopardy assessments. In both situations, the court reasoned, the defendant has no claim of title on the property in question because the government technically owns it. *Id.* Therefore, just as in the tax assessment

The court, comparing a RICO or CCE defendant's assets to a bank robber's loot[201] and stating that no court would knowingly allow the robber to use the stolen money to pay his attorney,[202] refused to create a special class of defendants with the unique ability to benefit from the use of their "loot."[203] The court also stated that it would not acknowledge the argument that appointed counsel is inherently inferior.[204] Finally, the court reasoned that any conflicts of interest created by forfeiture are "more theoretical than real."[205] The court concluded that it was up to Congress, not the courts, to ultimately determine if attorneys' fees should be exempt from criminal forfeiture.[206]

In the third case, *United States v. Jones*,[207] the Fifth Circuit upheld a lower court's exemption of attorneys' fees from forfeiture, expressly following *Rogers* and its progeny.[208] In so doing, however, the *Jones* court cautioned that the interests of the defendant in having access to funds to pay for living expenses must be carefully balanced against the government's interest. [209] If a defendant possesses

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situations, the defendant should not be allowed to use assets frozen by the restraining order to pay his attorney. *Id.* at 646.

201. *Id.* at 645-46. *Harvey* made a similar comparison—but came to the opposite conclusion. *See Harvey*, 814 F.2d at 926, *rev'd sub nom. Caplin*, 837 F.2d at 649. *Harvey* concluded that the government, in seizing the robber's loot, is seizing property that is obviously owned by someone else. *Id.* Property only circumstantially associated with a criminal enterprise does not, however, have such an easily discernable title.

202. *Caplin*, 837 F.2d at 645.

203. *Id.* at 646. The dissent, however, characterized the denial of attorney fee exemption as creating a class of accused criminal with fewer sixth amendment rights. *Id.* at 652 (Phillips. J., dissenting)(Judge Phillips is the author of the *Harvey* opinion). The dissent stated that "the right to private counsel of choice guaranteed by the sixth amendment cannot be made to turn on how bad the particular crime or criminal may be." *Id.*

204. *Id.* at 646-47. The court noted that this would lead to the absurd result of the government being unable to prosecute drug defendants who are apprehended with no assets in their possession. *Id.* The court admitted that forfeiture may place an incredible strain on the public defender's office and make CJA administration more difficult, but stated that such considerations are matters of policy and do not warrant the creation of new constitutional rules. *Id.* at 647.

205. *Id.* at 648-49. The court refused to acknowledge that defense lawyers might, as a class, renounce their professional obligations to their clients and attempt to prepare for trial while avoiding knowledge of their fee sources so that they might retain bona fide purchaser status. *Id.* The court also noted that the observance of Justice Department guidelines, see *supra* notes 135-36 and accompanying text for an explanation, will minimize the possibility of conflicts. *Id.*

206. *Id.* The court presented the pros and cons of attorney fee forfeiture in light of the sixth amendment, the efficient administration of justice, and the public's perception of the legal community. *Id.* Concluding that there is evidence supporting both the exemption and inclusion of attorneys' fees, the court stated that it was not in the position to decide the debate. *Id.* Congress alone is in the position to resolve this controversy. *Id.*

207. 837 F.2d 1332 (5th Cir. 1988).

208. *Id.* at 1334.

209. *Id.*

non-forfeitable assets, these funds may be used to pay his legal expenses.[210] The Fifth Circuit's adoption of the *Rogers* rationale may be short lived, however. The *Jones* decision contained a concurring opinion which advocated following the *Caplin* rationale[211] and the Fifth Circuit has decided to rehear the *Jones* case *en banc*.[212]

The fourth and most recent case, *United States v. Monsanto*[213] refused to follow the *Rogers* rationale but rejected the trend in the other circuits to allow attorney fee forfeiture. After initially issuing a restraining order which froze the defendant's assets, the trial court relied on *Harvey* and modified the order so that the defendant could pay his attorney out of forfeitable assets.[214] The court, however, insisted that the fee must not exceed the rates established for court appointed counsel in the Criminal Justice Act ("CJA").[215] The Second Circuit, in its first hearing of the case ("*Monsanto* I"),[216] reversed, agreeing with the *Harvey* court's conclusion that Congress intended forfeiture to encompass attorneys' fees, but disagreeing with the *Harvey* and *Nichols* results which replaced this clear legislative intent with judicial policy.[217] The real concern, the court concluded, was whether the assets out of which the defendant wanted to pay his attorney were manifestly connected with the crime for which he was on trial.[218]

The court in *Monsanto* I held that in order to determine the source of the assets, a post-restraining order adversarial hearing must be held.[219] At this hearing, the government must prove that a jury would probably find the assets forfeitable.[220] Any assets which

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210. *Id.*

211. *Id.* at 1336 (Davis, J., concurring).

212. United States v. Jones, 844 F.2d 215 (5th Cir. 1988).

213. 852 F.2d 1400 (2d.Cir. 1988) ("*Monsanto* II"). Monsanto wanted to sell two parcels of real property and use the proceeds to pay his attorney. United States v. Monsanto, 836 F.2d 74, 75 (2d Cir. 1987) ("*Monsanto* I"). The court had issued a restraining order, pursuant to the CCE forfeiture provisions, preventing the defendant from selling his land. *Id.* at 75-76.

214. *Monsanto* I, 836 F.2d at 76.

215. *Id.* The CJA is found in 18 U.S.C. § 3006A (1982 & Supp. IV 1986).

216. United States v. Monsanto, 836 F.2d (2d. Cir. 1987).

217. *Id.* at 80-81. *Monsanto* I characterized the *Nichols* and *Harvey* decisions as giving too much value to a defendant's right to use criminal profits to pay the counsel of his choice, while undervaluing the government's interest in seizing property which it legally has title to under the statute. *Id.*

218. *Id.* at 81-82.

219. *Id.* at 82-83.

220. *Id.* at 84. (citing Brickey, *supra* note 5, at 524-25). Before the 1984 amendments, the standard of proof for establishing that the defendant had violated the statutes and that his assets were subject to forfeiture was the probability of convincing a jury beyond a reasonable doubt. *Id.* at 83. Post amendment cases have held that the government's standard of proof for continuing the freeze order and applying it to attorneys' fees is met by the indictment itself, although a grand jury's finding of probable cause that a defendant violated the statute and that certain assets are forfeitable are not irrebuttable. *Id., quoting Thier*, 801 F.2d at 1470. The *Monsanto* I

the government could not establish as "probably forfeitable" would be exempt from the restraining order and could be used to pay counsel.[221] The Second Circuit did agree with the trial court, however, that any attorneys' fees paid from funds originally restricted by the restraining order must not exceed CJA rates.[222]

After an *en banc* rehearing ("*Monsanto* II"),[223] the Second Circuit vacated *Monsanto* I[224] and, in a *per curiam* opinion, specifically stated that a defendant should be allowed access to restrained assets to pay legitimate attorneys' fees.[225] There was, however, substanital disagreement within the court as to the legal reasoning supporting this decision. One concurring judge noted that there was no compelling government interest which outweighed the defendant's right to counsel of choice.[226] He went on to explain that while a criminal should not be permitted to obtain a particular attorney with his ill-gotten gains, one of the foundational principles of our adversarial system is to protect the rights of the accused.[227] Balancing the inter-

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court, in deciding that the standard of proof should be the probability of success at trial, noted that using this lesser burden of proof in a criminal context was anomalous. *Monsanto* I, 836 F.2d at 83.

221. *Monsanto* I, 836 F.2d at 84.

222. *Id.* at 85.

223. United States v. Monsanto, 852 F.2d 1400 (2d Cir. 1988) ("*Monsanto* II").

224. *Id.* at 1402.

225. *Id.*

226. *Id.* (Feinberg, C.J., concurring). Judge Feinburg noted that the usual reasons for inhibiting the right to choice of counsel, such as prohibiting a defendant from replacing his attorney once trial has commenced, is only a partial limit of the right. RICO and CCE forfeiture, however, completely deprive a defendant of choice of counsel, even before the trial begins. *Id.* Judge Feinberg listed three reasons why the court must allow the defendant access to his frozen assets: 1. The government's claim to the allegedly tainted property is conditional, and is not determined until the end of the trial; 2. The purpose of the forfeiture provisions is to strip the defendant of his economic power. The ability to hire an attorney is only one small aspect of that power. The rest of his assets are still frozen and unreachable. The judge also noted that frozen assets should only be used to pay an attorney when no other assets are available; 3. The judge rejected the government's argument that restraining a defendant's assets is no different than restraining a defendant's liberty before trial in the interest of public safety. He stated that the restraint in RICO and CCE cases affects the right to counsel of choice, which in turn affects a defendant's liberty interests. *Id.* at 1402-03.

227. *Id.* at 1403. Judge Oakes, in the second concurrence, also noted that the sixth amendment operates on an institutional level in protecting the rights of society as a whole, as well as providing protection for an individual criminal defendant. *Id.* at 1404 (Oakes, J., concurring). He stated that "there is a systemic interest in permitting defense counsel to perform their proper role in our adversary system of justice, a role in and of itself worthy of protection." *Id.* Judge Oakes also noted that the pre-trial hearing originally ordered by the panel in the original Second Circuit ruling will not solve the problems created by the forfeiture of attorneys' fees. *See Monsanto*, 836 F.2d at 86-87 (Oakes, J., dissenting). In that dissent, Judge Oakes described the problems which a post-restraining order hearing would entail. A defendant probably would not be able to retain counsel for that hearing. *Id.* Also, despite theoretically bearing the burden of proof, the government will probably always prevail because without counsel, the defendant will likely not be able to present evidence or cross-

ests of the government in preserving property for forfeiture against these basic principles, this judge concluded that "[t]he government should not be permitted to cripple the defendant at the outset of the trial by depriving him of the funds he needs to retain counsel."[228]

Another opinion in *Monsanto* II[229] agreed with *Monsanto* I's requirement for a hearing in connection with the restraining order, but held that Congress, not the courts, must establish the procedural guidelines to protect a defendant's sixth amendment rights.[230] This judge noted that the hearing requirement is irreconcilable with the legislature's intent because Congress specifically rejected such a procedure.[231] Also, exempting from post-trial forfeiture those assets used to pay the defendant's attorney fees is contrary to the comprehensive scope that Congress desired for the criminal forfeiture statutes.[232] With this in mind, this judge refused to join the majority in holding that assets freed to pay an attorney could *never* be subject to post-trial forfeiture.[233]

The *Monsanto* II decision, while resulting in the vindication of a defendant's sixth amendment interests, leaves many questions unanswered. First, despite holding that legitimate attorneys' fees are exempt from forfeiture, the court did not clearly define what it meant by "legitimate."[234] Second, the court is equally unclear about when there is a need for a hearing.[235] Finally, it is also unclear how far the RICO and CCE forfeiture provisions will reach in preserving a defendant's property for post-conviction forfeiture.[236]

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examine. *Id.* at 87. Finally, in light of the Supreme Court's ruling in Eisen v. Carlisle & Jaquelin, 417 U.S. 156, 177-78 (1974)(refusing new procedural steps which would create a "universe of mini-trials" in class action settings), the court should be reluctant to create new procedural measures which will burden the judicial process. *Id.*

228. *Id.* at 1404 (quoting United States v. Thier, 801 F.2d 1463, 1477 (5th Cir. 1986), *modified*, 809 F.2d 249 (1987)).

229. Judge Miner concurred in part and dissented in part, *Monsanto*, 852 F.2d at 1411.

230. *Id.* at 1411 (Miner, J., concurring in part and dissenting in part.)

231. *Id.*

232. *Id.*

233. *Id.* at 1412.

234. The *per curiam* opinion parenthetically defined legitimate as "non-sham." *Monsanto*, 852 F.2d at 1402.

235. Two concurring opinions, by Judge Feinberg and Judge Oakes, reject the hearing requirement. *Id.* at 1402, 1404. Judge Miner's opinion concurs in the *per curiam* result, but insists that a hearing is needed to satisfy due process requirements. *Id.* at 1411.

236. One of the concurring opinions went so far as to state that the constitutional problems of the forfeiture provisions need not be reached. *Id.* at 1405 (Winter, J., concurring). Because the forfeiture provisions state that the assets of a defendant "may" be subject to forfeiture, rather than "shall," no court can restrain funds that a defendant needs to make ordinairy lawful expenditures—including those for his defense. *Id.* Winter believes this statutory language simply empowers the district court to equitably manage the defendant's assets and prevent him from dispersing funds in

Due to the conflict among the circuits,[237] the Supreme Court may well grant certiorari in one or more of the aforementioned cases in order to establish a uniform interpretation of the RICO and CCE forfeiture provisions as applied to attorneys' fees. Any review of these cases, however, would present the Supreme Court with a monumental decision. Should the Court follow its *Russello* decision[238] and allow RICO and CCE forfeiture to reach attorneys' fees, or should it instead follow its sixth amendment precedent[239] and perhaps hold that RICO and CCE forfeiture is unconstitutional when applied to the attorneys' fees of defendants?

V. The Solution: Finding an Interpretation of RICO and CCE Forfeiture that Realizes Statutory Purpose Without Violating Sixth Amendment Rights

Because courts are to avoid deciding questions of political questions,[240] the *Caplin* court correctly deferred to Congressional intent

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which the government has a potential interest. *Id.* at 1406-09. Judge Winter even went so far as to equate expenses needed for emergency surgery with expenses needed for legal counsel. Because a surgeon might be as expensive as an attorney, there is no reason why a court, viewing the defendant's needs equitably, should allow the defendant to use frozen assets to pay a doctor, but not his attorney. *Id.* at 1408-09. In addition, preventing the payment of the attorney infringes a constitutional right, while an equitable consideration like medical costs does not. *Id.* at 1409. However, in light of the clear language of the statute and the discredited reasoning of *Roger's* this construction of the statute is not tenable. *See Id.* at 1413 (Mahoney, J., dissenting)(options a court "may" pursue controlled by unambiguous legislative intent to preserve forfeitable criminal property). *See also* United States v. Stein, 690 F. Supp. 767, 771 (E.D.Wis. 1988) (plain language of statute refers to "any" property and contains no exclusion for attorneys' fees, "family, charity or wine, women and song").

237. In addition to these four decisions, the Seventh Circuit has potential problems in this area. In United States v. Estevez, 852 F.2d 239 (7th Cir. 1988), the court refused to consider an appeal asking the court to allow more than $40,000 dollars in attorneys' fees to be exempt from forfeiture because the appeal was not timely. The district court in *Estevez*, however, had allowed the defendant to pay legitimate attorneys fees from his forfeitable assets. United States v. Estevez, 645 F. Supp. 869 (E.D. Wis. 1986). United States v. Stein, 690 F. Supp. 767 (E.D. Wis. 1988), conflicts with the district court ruling in *Estevez*, holding that attorneys' fees are not exempted under the statute. *Id.* at 773. The *Stein* court stated that to hold otherwise would "confer a special status upon cocaine kingpins." *Id.* at 772. This internal conflict within the Seventh Circuit will inevitably result in another federal circuit deciding how to interpret RICO and CCE forfeiture as it applies to attorneys' fees. Considering the split in the four decisions analyzed in the text, there is no way to confidently predict how the Seventh Circuit will decide this issue.

Another interesting development is United States v. Friedman, 849 F.2d 1488 (D.C. Cir. 1988), where the District of Columbia Circuit held that the sixth amendment creates no right for a defendant to use forfeited assets to finance the appellate counsel of his choice.

238. For a discussion of the *Russello* holding, see *supra* notes 33-37 and accompanying text.

239. For an explanation of how the Court characterizes sixth amendment rights, see *supra* notes 60-124 and accompanying text.

240. *See* Baker v. Carr, 369 U.S. 186, 217 (1962). In *Baker*, the Court decided that if any of the following factors are present, it will decline to hear the case: 1. The

when determining the reach of the forfeiture statutes. However, courts also have an obligation to uphold the Constitution.[241] Even legislation enacted with the best of intentions must not deny any citizen a fundamental right,[242] absent an overriding government interest for doing so.[243] While the government's interest in destroying the economic power base of organized crime[244] is certainly important, only in the rarest of cases will this override an individual's sixth amendment rights.

In other non-forfeiture settings, the government can only interfere with a defendant's choice of counsel by showing that it would somehow conflict with the efficient administration of justice.[245] It will usually be difficult for the government to prove that the orderly administration of justice outweighs the defendant's right to choice of counsel.[246] In fact, in practically every RICO and CCE case cited in this comment,[247] the government failed to meet such a burden of proof for interfering with the right to choice of counsel.[248]

Any court that objectively applied this balancing test would dis-

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Constitution directs that Congress or the President has the power to decide the matter in question; 2. There are no "judicially discoverable and manageable standards;" 3. The Court cannot decide the issue without some initial policy determination that is "clearly for non-judicial discretion;" 4. A judicial decision will show lack of respect to the other branches of government; 5. The Court sees a need to adhere to a political decision already made; 6. There is a potential for more than one pronouncement on this matter by various government departments. *Id.*

241. *See* Marbury v. Madison, 1 Cranch 137 (1802) (duty of Court to strike down an act of Congress that is at odds with the Constitution).

242. Fundamental rights are those which originate in the express terms of the Constitution or which are implied from those terms. BLACK'S LAW DICTIONARY 607 (5th ed. 1979).

243. For example, the government must show a compelling state interest to interfere with the fundamental rights guaranteed by the fourteenth amendment's equal protection clause. G. GUNTHER, CONSTITUTIONAL LAW 588-89 (11th ed. 1985). Since sixth amendment rights are also fundamental, see *supra* notes 60-61, it is reasonable to demand the same showing where the government interferes with the right to counsel.

244. *See* S. REP., *supra* note 19, at 3374 (purpose of amendments was to strip organized crime of its economic base).

245. *Against Forfeiture*, *supra* note 20, at 136.

246. *Id.*

247. The exception is the *Castellano* case. See *infra* note 258 for an explanation.

248. While the other three sixth amendment rights discussed in this comment are vitally important, the central issue in attorney fee forfeiture is right to *choice* of counsel. While cases like *Rogers*, *Badalamenti*, and *Harvey* all address the absolute right to counsel, see *supra* notes 60-98 and accompanying text, the right to effective assistance of counsel, see *supra* notes 99-114 and accompanying text, and the right to a fair trial, see *supra* notes 115-36 and accompanying text, have not been at issue before RICO and CCE courts as often as the right to choice of counsel. It is true that the relation back provision effects the other three sixth amendment rights up to the time trial begins. However, only the right to counsel is absolute, and, due to the availability of appointed counsel, the right to choice of counsel is the only one of the four sixth amendment rights that can potentially be violated from the time the crime is committed until the judgment of forfeiture is entered after conviction.

cover that the forfeiture of attorney fees itself actually impedes judicial procedure and efficiency.[249] Because it is more difficult for RICO and CCE defendants to find representation, the time before a case can come to trial increases.[250] Often, the defendant's chosen attorney may either choose to withdraw over the forfeiture issue or be forced to withdraw because of the ethical problems the forfeiture of fees creates.[251] This causes delay and forces an unprepared public defender to hastily prepare for a complex trial.[252] Fee forfeiture simply does not advance the government's interest in judicial efficiency.

The paramount concern behind the RICO and CCE statutes is the government's ability to cripple the financial strength of organized crime.[253] However, a balancing test simply between an efficient docket and choice of counsel does not even address this statutory purpose.[254] Therefore, unless the prosecution can also show that a defendant's chosen counsel will interfere with the forfeiture provisions' objectives, then attorney fee forfeiture violates a defendant's sixth amendment right to choice of counsel.

For example, a court might subpoena a RICO or CCE defendant's attorney to determine if the fees the defendant paid the attorney are subject to forfeiture. Requiring an attorney to testify against his client would force the attorney to disqualify himself[255] and effectively destroy the defendant's choice of counsel.[256] In balancing the interests of the government against those of the defendant, the government should be able to require the attorney's testimony only if the public interest in the attorney's testimony overrides the defendant's right to representation by the attorney of his choice.[257] There-

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249. *Criminal Forfeiture*, *supra* note 30, at 1210.

250. *Id.* at 1210-11.

251. For a detailed discussion of the ethical problems defense attorneys inherently face in fee forfeiture, see *supra* notes 103-14 and accompanying text.

252. United States v. Reckmeyer, 631 F. Supp. 1191, 1197 (E.D.Va. 1986).

253. S. REP., *supra* note 19, at 3374.

254. *Against Forfeiture*, *supra* note 20, at 136. In addition, in both cases the government is not the only beneficiary of an efficient docket. Defendants also have an interest in a speedy trial. This includes the defendant currently on trial and the many defendants that a trial delay would inconvenience. *Id.* at 136, nn. 63-64. This means that to truly balance its own interests with a defendant's, the government must take into account both the defendant's sixth amendment rights and the defendant's interest in an efficient docket when considering its own interests in speedy criminal prosecution. It is conceivable that both sides could have an interest in seeing the case go to trial quickly. It is difficult for the court to equitably "balance" in such a situation.

255. Under the MODEL CODE OF PROFESSIONAL RESPONSIBILITY D.R. 5-102(B) (1987), a lawyer must withdraw if he knows he must testify as a witness other than on behalf of his client and if such testimony will be prejudicial to his client's interests.

256. United States v. Klubock, 639 F. Supp. 117, 119 (D. Mass 1986).

257. This view has not yet gained wide acceptance. Attorneys often receive no special exemption from grand jury subpoenas. Note, *A Critical Appraisal of the Justice Department Guidelines for Grand Jury Subpoenas Issued to Defense Attorneys*, 1986 DUKE L.J. 145, 148 (1986)[hereinafter *Subpoenas*]. However, the practice of forcing attorneys to testify against their clients before a grand jury is coming under

fore, if during the grand jury investigation, the government offers substantial proof that the attorney's testimony will be essential to establish the existence of a criminal enterprise, the attorney should have to testify.[258] However, if this information could be obtained through other means,[259] compelling the attorney's testimony would be improper.[260] If, however, courts consider the basic purpose of

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increasing criticism. *Id.* at 145. In the area of attorneys' fees in particular, the government has found a need to gain information directly from defense attorney testimony. *Id.* at 149-50. In RICO cases, proof of a criminal enterprise's financial gain and proof that a single benefactor paid the fees of several defendants as part of a conspiracy, can usually only be obtained through attorney testimony. *Id.* These important government interests, however, need to be balanced against the interests of society. *Id.* at 149. Several courts are remedying the situation by requiring that the information sought from the attorney be both relevant and necessary. United States v. Schofield, 486 F.2d 85 (3d. Cir. 1973), *later appeal*, 507 F.2d 963 (3d. Cir), *cert. denied*, 421 U.S. 1015 (1975). Other possible matters courts need to consider are the effects such subpoenas have on attorney-client privilege, *Subpoenas*, *supra*, at 157-162, and the constitutional ramification on right to choice of counsel. *Id.* at 162-165. *See In re* Grand Jury Subpoena Served Upon John Doe, 759 F.2d 968, 972 (2d Cir. 1985), *vacated*, 781 F.2d 238 (2d Cir), *cert. denied*, 106 S. Ct. 1515 (1986)(without showing absolute need, government cannot interfere with defendant's right to choice of counsel); *In re* Special Grand Jury No. 81-1 (Harvey), 676 F.2d 1005, 1011-12 (4th Cir.), *vacated on other grounds*, 697 F.2d 112, 113 (4th Cir. 1982)(to force defense attorney to testify, government must show that information sought is necessary and that attorney is best source of information). *See also In re* Taylor, 567 F.2d 1183, 1186 n.1 (2d Cir. 1977) (arbitrarily preventing a grand jury defendant from retaining choice of counsel violates due process). While courts appear to be more and more concerned about this problem, a hindrance still exists in that the right to counsel does not attach at the grand jury stage. *Subpoenas*, *supra*, at 162-63.

258. United States v. Castellano, 610 F. Supp. 1151 (S.D.N.Y. 1985). A single defense attorney had previously represented several of the co-defendants in a RICO investigation. After an *in camera* hearing involving the attorney, the court determined that his testimony was not necessary to establish the fact that a criminal enterprise existed among his current and former clients. *Id.* at 1153. However, the government established a substantial need to introduce evidence of the attorney's activities amongst the defendants in order to establish a *prima facie* case. *Id.* The court ordered the disqualification of the attorney, expressly stating that in special instances such as this, the public interest outweighs the defendant's right to counsel of his own choice. *Id.*

259. United States v. Badalamenti, 614 F. Supp. 194, 201 (S.D.N.Y. 1985)(because government could have established attorney's fee information by expert testimony, it was improper to require attorney to testify or produce documents regarding fee arrangements relating to pending RICO indictment).

260. The courts have a duty to supervise the grand jury process so it is not abused or used for the purposes of oppression or injustice. *Klubock*, 639 F. Supp. at 119 (D.Mass. 1986). This supervisory power includes preventing the use of subpoenas to harass a defendant, to impede a defense attorney's ability to effectively prepare his clients defense, or to unduly interfere with the attorney-client relationship. United States v. Moss, 756 F.2d 329, 332 (4th Cir. 1985). *See also In re* Grand Jury Subpoena Served Upon John Doe, 759 F.2d 968 (2d Cir. 1985), *vacated*, 781 F. 2d 238 (2d Cir.), *cert. denied*, 106 S. Ct. 1515 (1986). The original opinion in *Doe* articulated that the government must show both that the information sought from the defendant's attorney was relevant and that the government could not obtain the information anywhere else. The *en banc* court only required that the subpoena not be unreasonable or overly burdensome. *Id.* If the dominant purpose of the government's subpoena violates any of these principles, or is used purposely for the disqualification of a particular defense counsel, the court should not allow it.

criminal forfeiture—to destroy the economic base of organized crime—it becomes difficult to balance the statutory purpose against a defendant's sixth amendment rights. *Harvey*'s rationale goes too far.[261] Not every non-sham transfer to an attorney would be protected under the sixth amendment.[262] The conclusions of *Nichols* and *Caplin* are also too severe.[263] A principle of property law that is technically a legal fiction[264] should not be used to infringe on a fun-

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The test for determining if the grand jury process has been abused is the "sole or dominant purpose" test. United States v. Zarattini, 552 F. 2d 753, 756 (7th Cir), *cert denied*, 431 U.S. 942 (1977). The court looks behind the subpoena to the government's actual purpose. If the party subpoenaed is being investigated as a possible suspect, or will reveal information on possible suspects, the dominant purpose is proper, no matter how inconvenienced the party becomes. If the purpose of the subpoena is to use the grand jury as a substitute for discovery in the gathering of evidence for trial, the purpose is improper. *Moss*, 756 F.2d at 332.

If the government cannot prove that the defendant's chosen attorney will hinder the forfeiture process, the government should not interfere with the defendant's right to choice of counsel. Unfortunately, many courts have used subpoenas to force RICO defendants' attorneys to testify about their fees in regards to forfeiture, forcing disqualification. *See, e.g., In re* Grand Jury Subpoena Duces Tecum dated January 2, 1985, 605 F. Supp. 839 (S.D.N.Y.), *rev'd on other grounds*, 767 F.2d 26 (2d Cir. 1985)(disclosure of fee information is not privileged and because grand jury testimony did not interfere with attorney's preparation for trial, compelling such testimony did not violate the sixth amendment.)

Forcing attorneys to testify against their clients about fee information not only affects the defendant's right to counsel, it also adversely affects the attorney-client privilege. Brickey, *supra* note 5, at 535. For more information on the effects of RICO and CCE on attorney-client relations, see *supra* notes 91-102 and accompanying text. Also, the potential use of subpoena power to force a particular attorney's disqualification affects a defendant's right to a fair trial. See *supra* notes 118-124 and accompanying text for an explanation. For a further explanation of how forcing an attorneys to testfy about his fee arrangements, even at a pre-trial hearing, violates the defendant's sixth amendment rights due to ethical problems, see *supra* notes 106-117, 255-60 and accompanying text.

261. For a discussion of the *Harvey* case, see *supra* notes 186-93 and accompanying text.

262. The analogy of the bank robber's loot is a perfect example. While the *Harvey* court characterizes this as a case of the government being sure of the fact that the defendant has no claim of right to the assets, *Harvey* 814 F.2d at 926, the sale of a drug defendant's contraband would be no different. No court, for example, would allow a defendant to use cash, which the government could prove unequivocally was obtained directly from a drug sale, to pay legitimate attorney's fees. *Caplin*, 837 F.2d at 645. This is partially due to the fact that such funds would become evidence at the trial. However, such a transfer of funds is technically not a sham.

263. For a discussion of the *Caplin* case, see *supra* notes 194-206 and accompanying text; for a discussion of the *Nichols* case, see *supra* notes 174-83 and accompanying text.

264. For an explanation of *in rem* forfeiture's legal fiction, see *supra* note 5. The key to determining whether attorney fee forfeiture is possible is the relation back doctrine. United States v. Nichols, 841 F.2d 1485, 1509-10 (10th Cir. 1988) (Logan, J., dissenting). Comparing the government's interest in the RICO or CCE defendant's property with a bank's interest in stolen funds is ludicrous. The bank's interest is grounded in traditional principles of common law property ownership, as well as property interests protected in the Constitution. *Id.* at 1510. The government's interest in the tainted property is based solely on the public policy which states that criminals should not profit from their crimes. *Id.* at 1510-11. Therefore, in balancing these interests, the government should only be allowed to infringe on an owner's com-

damental right.[265] It appears that there is no way to meet the interests of one side of this controversy without sacrificing the interests of the other.

Because the purpose of RICO and CCE forfeiture is to "strip these offenders and organizations of their economic power,"[266] assuring that RICO and CCE defendants will never be able to reclaim their ill-gotten assets after conviction meets the statutory purpose. The final destination of the property, so long as it is not with the defendant, is irrelevant. Congress recognized this by creating the bona fide purchaser exception. Similarly, exempting attorney fees from forfeiture does not offend this basic statutory purpose.

Advocates of fee forfeiture nonetheless argue that exempting attorney fees allows the defendant to unconscionably benefit from his criminal activity.[267] However, such a "benefit" is a right mandated by the sixth amendment[268] and is an integral part of our judicial system.[269] The conviction of the guilty and exoneration of the innocent benefits the individual defendant and society as a whole.[270] Organized crime gleans no special benefit from the proper operation of the judicial system.[271] A guilty RICO or CCE defendant, even if allowed to pay for his attorney from forfeitable funds, will be sepa-

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mon law property rights to deprive that owner of the fruits of his crime, or to prevent the commission of further crimes. Under this analysis, the pre-trial restraining of assets should only be used to prevent dissipation or concealment. *Id.* at 1511.

265. *In re* Forfeiture Hearing as to Caplin & Drysdale, 837 F.2d 637, 652 (4th Cir. 1988) (Phillips, J., dissenting). One argument for finding that Congress did not intend that fees paid to attorneys before the restraining order be forfeitable is the traditional difference in purpose between *in rem* and *in personam* forfeiture. Courts have commonly interpreted in personam forfeiture to be a punitive measure, while in rem is remedial. *Criminal Forfeiture*, *supra* note 30, at 1205. The purpose of the relation back provision, therefore, is to remedy rather than punish. To allow courts to use a remedial principle to punish innocent third parties such as attorneys—along with the defendants—is unfair. *But see* United States v. United States Coin and Currency, 401 U.S. 715, 721-22 (1971) (rejecting the remedial punitive distinction and stating that *in rem* forfeiture was intended to impose a penalty on those involved in a criminal enterprise).

266. S. REP., *supra* note 19, at 3374.

267. *Caplin*, 837 F.2d at 640 & 645.

268. Unlike other benefits the RICO or CCE defendant can purchase with his ill-gotten gain, the services of an attorney are protected by the Constitution. Arguably, the writers of the sixth amendment perceived that potentially guilty defendants would use criminal assets to pay their attorneys. *See Harvey*, 814 F.2d at 924-25.

269. United States v. Monsanto, 852 F.2d 1400, 1404 (Oakes, J., concurring).

270. *Id. See also* Cloud, *Forfeiture of Attorneys; Fees Under RICO: Protecting the Constitutional Rights of Criminal Defendants*, 61 N.Y.U. L. REV. 124, 146-48 (1986)(advocating consideration of the benefits to the justice system the right to choice of counsel produces).

271. "Expenditures the defendant must make to keep himself and his dependents alive and to secure competent counsel . . . should not be considered incentives to crime. The notion that a defendant would commit criminal acts to accumulate monies . . . in order to pay a reasonable fee to the attorney he chooses . . . is sophistry." United States v. Their, 801 F.2d 1463, 1474-75 (5th Cir. 1986), *modified*, 809 F.2d 249 (5th Cir. 1987).

rated from the rest of his ill-gotten gains after conviction. Therefore, the government cannot require fee forfeiture without showing that it is necessary to further the state's interest[272] in separating the convicted defendant from the remainder of his ill-gotten gains.

How can the courts ensure this "balance" between the legitimate interests of the state and the defendant? The post-restraining order hearing required by *Monsanto* I is the key. In this hearing, the government has the burden of proving that the fee arrangements violate the statute's purpose. The *Monsanto* panel's approach is problematic, however, due to the level of proof it requires.[273] The "probability of success" standard is more akin to a civil proceeding than a criminal trial.[274] Raising the standard of proof to "beyond a reasonable doubt" will better protect the defendant's rights while still affording the prosecution the benefits of the statute.[275] This will

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272. Because the statutes' purpose is to destroy the power base of organized crime and separate the criminal from his ill gotten gain, see United States v. Nichols, 654 F. Supp. 1541, 1558 (D.Utah 1987); S. REP., *supra* note 19, at 3374, unless the government can show that these interests are hindered by attorney fee exemption, there should be no fee forfeiture. *But see* S. REP., *supra* note 19, at 3387 (purpose of restraining order is to preserve evidence for forfeiture). The issue of preventing the defendant from dispersing his property through his attorney is really not important, for if the government can prove that the defendant is disposing of his property to avoid forfeiture, the statutory interest in destroying the economic power base of crime is met, unless the attorney is part of the criminal enterprise. Also, if the court supervises attorney fee payment, this problem is avoided altogether. For a discussion, see *infra* notes 284-88 and accompanying text.

273. The standard of proof that the government must meet to obtain a restraining order, under the panel's ruling, is a probability of successfully proving the property is forfeitable at trial. *Monsanto* I, 836 F.2d at 83. The standard established by the *en banc* rehearing is unclear, however, because some of the concurring judges felt the hearing was unnecessary, while one avoided the decision, by deferring to Congress. See *supra* note 235 for an explanation of these differences.

274. The usual standard of proof in a criminal proceeding is "beyond a reasonable doubt." It appears the lowering of the proof standard is related to the origin of the relation back doctrine, which has its roots in the *in rem* foundation of civil forfeiture. For an explanation of the difference between civil and criminal forfeiture, see *supra* note 5. The courts should not, however, allow the legal fiction of *in rem* forfeiture to infringe on fundamental sixth amendment rights.

275. This author in no way advocates turning the pre-trial restraining order hearing into a second trial. The restraining order hearing will still retain its *ex parte* nature, *see* United States v. Their, 801 F.2d 1463, 1469 (5th Cir. 1986), with its less stringent evidentiary requirements. Within this hearing, however, the government should not be allowed to prevent a defendant from paying for goods or services from his assets. For example, absent some showing of compelling need, the court could not use the restraining order to prevent the defendant from buying food for his family. This would be a violation of due process. *See* G. GUNTHER, CONSTITUTIONAL LAW 566 (11th ed. 1985)(this is technically a deprivation of life under the fourteenth amendment). In the same way, courts should not deprive a defendant of his fundamental sixth amendment rights without showing a compelling need. The standard of probability of success is simply too flimsy a burden of proof to hang a fundamental right upon. However, since this is still connected with an *ex parte* hearing, the standard proposed by *Monsanto* I can apply to considerations of non-fundamental rights. Thus, the basic distinction is that the courts should use a higher standard of review when considering fee forfeiture in the restraining order hearing, while still allowing

allow the government to both prevent obvious abuses[276] and preserve assets for forfeiture in appropriate cases.[277] In addition, the defendant's due process rights[278] and his sixth amendment right to counsel of choice would both be protected.

In order to protect the government's legitimate interest in preserving criminal assets for forfeiture,[279] courts also need to supervise the fee arrangement between the RICO or CCE defendant and his attorney. *Monsanto* I's holding that CJA rates should apply, however, poses three potential problems.[280] First, the courts may not wish to interfere with the private right of defense attorneys to charge whatever they deem appropriate.[281] Second, the possibility of an innocent defendant losing a capable attorney due to financial considerations is undesirable.[282] Third, limiting compensation to CJA rates may ultimately affect the quality of defense counsel, since more experienced and capable private attorneys will refuse to work for the lower CJA rates. This may force inexperienced and overworked public defenders to undertake complex and lengthy RICO and CCE litigation.[283]

Some courts have therefore suggested that "reasonable" attorneys' fees be exempt from forfeiture.[284] This would prevent the problems the flat CJA rates cause, and also help prevent prosecutorial abuse.[285] A court could easily establish a "reasonable

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the freeze orders to be effective as to most of the rest of the defendant's monetary needs.

276. For a discussion of funds obviously not exempt from forfeiture, see *supra* notes 201-03 and accompanying text. It is one thing to determine that funds or contraband seized in connection with an actual criminal transaction are "tainted," or connected to the crime. With property such as the defendant's bank account, however, connecting specific funds to specific criminal acts is much more difficult. Without a higher burden of proof, see *supra* note 275, it is unfair to deprive the defendant of assets or property that he needs to preserve his fundamental constitutional rights of counsel.

277. If the court supervises the payment of attorneys from the restraining order all the way through the end of trial, obvious injustices and sham transfers will be easier to discern and avoid. For a discussion of this court supervision, see *infra* notes 279-88 and accompanying text.

278. *See Their*, 801 F.2d at 1466-70. (explaining the particulars of due process requirements for pre-trial restraining order hearings).

279. S. REP., *supra* note 19, at 3387.

280. *Caplin*, 837 F.2d at 650 (Murnaghan, J., concurring).

281. *Id.* This is tantamount to price-fixing, which the Supreme Court prohibited local bar associations from doing in Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975)(local bar association's minimum fee schedule is "price-fixing" violation of federal anti-trust law).

282. *Caplin*, 837 F.2d at 650 (Murnaghan, J., concurring).

283. *Monsanto* I, 836 F.2d at 86 (Oakes, J., dissenting).

284. *See Monsanto* II, 852 F.2d at 1402; *see also* United States v. Harvey, 814 F.2d 905, 927 (4th Cir. 1987) (only fees not legitimate should be subject to freeze orders); United States v. Nichols, 654 F. Supp. 1541, 1559 (D.Utah 1987) (reasonable fees exemption required).

285. Expert and experienced attorneys will be more likely to stay on a case,

fee" in each case by means similar to those used to to determine attorney fee awards in civil proceedings, or simply by expert testimony.[286] After establishing a reasonable fee, the defendant could then petition the court for that amount.[287] The court would then pay the attorney directly from the defendant's frozen assets.[288]

CONCLUSION

The forfeiture provisions of the 1984 amendments to RICO and CCE are powerful weapons in the war against organized crime.[289] However, in applying these statutes, the government has abused the fundamental sixth amendment rights of many defendants.[290] The language of the statutes, if applied literally, hinders a defendant's ability to hire and retain an attorney,[291] to establish an effective relationship with an attorney,[292] and, ultimately, may even prevent

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even when a restraining order is issued. For an explanation of the problems arising from prosecutorial abuse, see *supra* notes 118-24 and accompanying text.

286. *See generally*, DEFNER & WOLF, COURT AWARDED ATTORNEY'S FEES, ¶¶ 42-43 (1985); NEWBERG, ATTORNEY FEE AWARDS, §2 (1986). In many areas of civil practice, the courts have created several novel methods for equitably determining attorneys' fees. For example, the "lodestar" method calculates the number of hours reasonably expended by the attorney in matters the client prevailed in. *Id.* at §§ 2.03-2.04. The value of this time, reflecting the attorney's individual skills, experience, reputation, and customary billing rate are amalgamated into a figure and multiplied by the time spent on the case. *Id.* While this method equitably allows a more qualified and experienced attorney to receive a higher fee, the same problems of confusing civil and criminal standards, see *supra* notes 272-73 and accompanying text, are present. Also, because lodestar appears to be contingent on prevailing in the litigation, the same problems with contingency arise as do in RICO. *See supra* note 99 and accompanying text. A better solution is to use expert testimony. If the average criminal attorney rate for a RICO or CCE case is established, the more experienced attorney, while not getting the most for his efforts, is at least going to make more than CJA fees. *See* United States v. Badalamenti, 614 F. Supp. 194, 201 (S.D.N.Y. 1985). When used in conjunction with criminal proceedings, such a system would also avoid the ethical pitfalls inherently part of a "lodestar" or similar system of assessing fees.

287. United States v. Monsanto, 852 F.2d 1400, 1408 (2d Cir. 1988) (Winter, J., concurring) ("actual making of expenditures . . . can be directly controlled by the district court to insure that they are for permissible purposes"); *Nichols*, 654 F. Supp. at 1559.

288. A clever defense attorney got around the system and accomplished this very proposal. *See* United States v. Figueroa, 645 F. Supp. 453 (W.D.Pa. 1986). A defense attorney assigned to represent an indigent CCE defendant petitioned after trial to be paid from the forfeitable fees and the court granted the petition. *Id.* If the courts can allow public defenders to be paid from forfeitable assets, they should pay privately retained attorney's in the same manner.

289. For a discussion of RICO and CCE purpose, see *supra* notes 19-27 and accompanying text.

290. For a discussion of how RICO and CCE effect sixth amendment rights, see *supra* notes 60-124 and accompanying text.

291. For a discussion of the defendant's right to counsel, see *supra* notes 60-86 and accompanying text.

292. For an explanation of how RICO and CCE affect the effective assistance of counsel, see *supra* notes 87-102 and accompanying text.

him from receiving a fair trial.[293] Some courts, following the lead of the second circuit in *United States v. Rogers*, have attempted to sidestep the constitutional issues by classifying attorneys as bona fide purchasers under the statutory exceptions to RICO and CCE forfeiture,[294] interpreting the legislative intent to exclude attorneys' fees.[295] This rationale is still good law in many federal circuits, despite recent decisions discrediting its interpretation of both the legislative intent and the statute's language.[296] However, while all these more recent cases have held that the statutes encompass attorneys' fees, they have arrived at different conclusions on the constitutionality of attorney fee forfeiture.[297]

The solution to these problems is to balance the important government interest in criminal forfeiture against a defendant's sixth amendment rights.[298] By making the post-restraining order hearing the procedural focal point, the court can prevent guilty defendants from using property or assets that they unequivocally have no title to,[299] as well as prevent obvious sham transfers to attorneys.[300] All defendants, guilty or innocent, receive the full protection of the sixth amendment under this procedure, while courts assure the efficient administration of justice[301] by supervising the payment of attorneys from forfeitable assets.[302] The ultimate purpose of criminal forfeiture is met because, after conviction, the criminal is still denied all access to his ill-gotten gain forever.[303]

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293. For an explanation of how RICO and CCE affect the right to a fair trial, see *supra* notes 103-24 and accompanying text.

294. For a discussion of attorneys as bona fide purchasers under RICO and CCE forfeiture, see *supra* note 133 and accompanying text. For an explanation of how this interpretation of the statutes is fallacious, see *supra* note 151 and accompanying text.

295. For a discussion of *Rogers'* interpretation of legislative history and intent, see *supra* notes 131-32 and accompanying text. For a discussion of the fallacy of this analysis, see *supra* notes 144-48 and accompanying text.

296. For a discussion of the most recent RICO and CCE decisions' rejecting the *Rogers* rationale, see *supra* notes 166-206, 213-36 and accompanying text.

297. For a discussion of the recent RICO and CCE cases, see *supra* notes 163-236 and accompanying text.

298. For a discussion of the author's proposal for exempting fee forfeiture without destroying RICO and CCE's statutory purpose of fighting organized crime, see *supra* notes 266-88 and accompanying text.

299. For a discussion of barring defendants from using ill gotten gain that is decisively connected with a particular act of crime, *e.g.*, a robbers "loot," see *supra* notes 284-88 and accompanying text.

300. Under either the *Rogers* or *Caplin* rationales, sham transfers to an attorney are forfeitable. *Against Forfeiture*, *supra* note 20, at 139.

301. For an explanation of the need to administer an efficient court docket, see *supra* notes 79-83 and accompanying text.

302. United States v. Monsanto, 852 F.2d 1400, 1408 (2d Cir. 1988) (Winter, J. concurring); United States v. Nichols, 654 F. Supp. 1541, 1559 (D.Utah 1987).

303. "[F]orfeiture [is] designed to strip these offenders and organizations of their economic power." S. REP., *supra* note 19, at 3374.

Because of the possible ramifications of a Supreme Court ruling on this issue, Congress should promptly amend the exceptions[304] to RICO and CCE forfeiture to permit payment of reasonable attorney fees. If the Supreme Court were to agree with the *Caplin* rationale, the fears of Mr. Wallace—that the defense bar will "cease to exist"[305]—may be realized. If the Court accepts a rationale more in line with the *Harvey* or *Monsanto* II reasoning, it may strike down the 1984 amendments as unconstitutional.[306] Neither result solves the problem. Congress should re-write the forfeiture exceptions to ensure the ongoing use of forfeiture as an effective weapon against organized crime, while not violating the fundamental rights that the sixth amendment guarantees.

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304. For a discussion of the statutory exceptions to criminal forfeiture under RICO and CCE, see *supra* notes 50-53 and accompanying text.

305. For a discussion of *Caplin*'s effect on the defense bar, see *supra* notes 9-10 and accompanying text.

306. In fact, the Court may be delaying a grant of certiorari to a RICO or CCE forfeiture case because it is trying to avoid this situation. The court has not considered a RICO forfeiture issue since *United States v. Russello*, 464 U.S. 16 (1983). In order to avoid the problems that either upholding or striking down the forfeiture provisions would bring, the Court may be waiting for Congress to act.