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# FORFEITURE OF ATTORNEYS' FEES UNDER RICO AND CCE

## INTRODUCTION

Recognizing that the war against organized crime required economic weapons, Congress enacted, as part of the Racketeer Influenced and Corrupt Organizations (RICO)<sup>1</sup> and Continuing Criminal Enterprise (CCE)<sup>2</sup> statutes, in-personam<sup>3</sup> forfeiture penalties<sup>4</sup> designed to strip criminal organizations of the proceeds of their crimes.<sup>5</sup> The Comprehensive Crime Control Act of 1984<sup>6</sup> closed some loopholes<sup>7</sup> in the forfeiture statutes by more clearly defining assets subject to forfeiture<sup>8</sup> and by adding a provi-

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1. Organized Crime Control Act of 1970, Pub. L. No. 91-452, tit. IX, 84 Stat. 922, 941-48 (codified as amended at 18 U.S.C.A. §§ 1961-68 (West 1984 & Supp. 1986)).

2. Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, § 408, 84 Stat. 1236, 1265 (codified as amended at 21 U.S.C.A. §§ 848, 853 (West Supp. 1986)).

3. The more common type of forfeiture, in rem forfeiture, is effected by a civil proceeding against unlawfully used property, which itself is considered the offender. See *United States v. United States Coin & Currency*, 401 U.S. 715, 719 (1971); *The Palmyra*, 25 U.S. (12 Wheat.) 1, 14 (1827); *United States v. L'Hoste*, 609 F.2d 796, 813 n.15 (5th Cir.), cert. denied, 449 U.S. 833 (1980). An example is the CCE civil forfeiture statute, 21 U.S.C.A. § 881 (West 1981 & Supp. 1986), which provides for forfeiture of controlled substances, containers, conveyances, plant and equipment. Forfeiture in rem is not dependent on an adjudication of personal guilt. See *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 683-84 (1974); *United States v. The Ruth Mildred*, 286 U.S. 67, 69 (1932).

In-personam forfeiture is a criminal penalty against an individual, and the scope of forfeiture is determined by the defendant's criminal conduct. *United States v. Ginsburg*, 773 F.2d 798, 800-01 (7th Cir. 1985); *L'Hoste*, 609 F.2d at 813 n.15; see *Hughes & O'Connell, In Personam (Criminal) Forfeiture and Federal Drug Felonies: An Expansion of a Harsh English Tradition into a Modern Dilemma*, 11 *Pepperdine L. Rev.* 613, 617 (1984); *Reed, Criminal Forfeiture Under the Comprehensive Forfeiture Act of 1984: Raising the Stakes*, 22 *Am. Crim. L. Rev.* 747, 747-48 (1985). Since constitutional protections afforded criminal defendants are implicated, procedures related to in-personam forfeiture are subject to strict scrutiny. *United States v. Lewis*, 759 F.2d 1316, 1324 (8th Cir.), cert. denied, 106 S. Ct. 406 (1985).

4. See 18 U.S.C.A. § 1963 (West Supp. 1986); 21 U.S.C.A. § 853 (West Supp. 1986).

5. See S. Rep. No. 617, 91st Cong., 1st Sess. 80 (1969). These sentiments were echoed in a report on the 1984 amendments. See S. Rep. No. 225, 98th Cong., 1st Sess. 191, reprinted in 1984 U.S. Code Cong. & Ad. News 3182, 3374 [hereinafter cited as 1984 Senate Report]. Congress recognized that imprisoning members of the criminal organization was not enough; an attack on the economic base of the organization's power was required. See *Russello v. United States*, 464 U.S. 16, 28 (1983); see also *Organized Crime Control: Hearings on S. 30 and Related Proposals Before Subcomm. No. 5 of House Comm. on Judiciary*, 91st Cong., 2d Sess. 107 (1970); S. Rep. No. 617, 91st Cong., 1st Sess. 78 (1969); 116 Cong. Rec. 591 (1970) (remarks of Sen. McClellan, a sponsor of RICO).

6. Pub. L. No. 98-473, 98 Stat. 1837 (1984).

7. The Senate Judiciary Committee wrote of the amendments: "This bill is intended to eliminate the statutory limitations and ambiguities that have frustrated active pursuit of forfeiture by Federal law enforcement agencies." 1984 Senate Report, *supra* note 5, at 192, reprinted in 1984 U.S. Code Cong. & Ad. News at 3375.

8. The new 18 U.S.C.A. § 1963(a)(3) (West Supp. 1986) and 21 U.S.C.A. § 853(a)(1) (West Supp. 1986) make clear that the forfeiture statutes reach "any property constituting, or derived from, any proceeds" of criminal enterprises, not merely the de-

sion whereby the government's title to forfeited property relates back to the time of the illegal act.<sup>9</sup> Subsequent transfers of the forfeitable property are void unless made to a "bona fide purchaser for value."<sup>10</sup>

The relation-back provisions have been the basis for the government's controversial attempts to seize legal fees paid by RICO and CCE defendants.<sup>11</sup> This use of the forfeiture statutes raises serious right-to-counsel questions.<sup>12</sup> While the ill-gotten gains become the property of the government upon commission of the illegal act, the determination that there was an illegal act, and that the assets transferred are ill-gotten, does not occur until a judgment of forfeiture.<sup>13</sup> Critics of the government's policy argue that the threat of forfeiture makes it difficult for defendants to retain effective counsel and thus infringes on the right guaranteed by the sixth amendment.<sup>14</sup> The government counters that a defendant is not entitled to defend himself using assets that may not belong to him.<sup>15</sup>

Part I of this Note examines whether the RICO and CCE forfeiture statutes should be construed to apply to fees paid to attorneys and concludes they should. Part II discusses the constitutional problems raised by such a construction. Part III proposes as a solution to the constitutional problems a pretrial hearing on the question of fee forfeiture, coupled with an assured appointed-counsel fee.

## I. APPLICATION OF THE FORFEITURE STATUTES TO ATTORNEYS' FEES

Only five decisions have interpreted the amended forfeiture statutes as

defendant's investment in the enterprise. These sections codify the holding of *Russello v. United States*, 464 U.S. 16, 28 (1983).

9. See 18 U.S.C.A. § 1963(c) (West Supp. 1986); 21 U.S.C.A. § 853(c) (West Supp. 1986). That forfeiture relates back to the time the criminal act was committed is not a novel notion. An implied relation-back feature has been found in in rem forfeiture statutes. See *United States v. Stowell*, 133 U.S. 1, 16-17 (1890) ("forfeiture takes effect immediately upon the commission of the act . . . and avoids all intermediate sales and alienations, even to purchasers in good faith"); *Ivers v. United States*, 581 F.2d 1362, 1367 (9th Cir. 1978); *Simons v. United States*, 541 F.2d 1351, 1352 (9th Cir. 1976).

18 U.S.C.A. § 1963(m) (West Supp. 1986) and 21 U.S.C.A. § 853(n) (West Supp. 1986) provide for a post-conviction hearing at which third parties may challenge a judgment of forfeiture pertaining to property transferred to them.

10. 18 U.S.C.A. § 1963(c) (West Supp. 1986); 21 U.S.C.A. § 853(c) (West Supp. 1986).

11. See *United States v. Ianniello*, No. S 85 Cr. 115, slip op. at 3 (S.D.N.Y. Sept. 3, 1985); Press, *Using Fees as Evidence*, *Newsweek*, Apr. 21, 1986, at 74, col. 2.

12. See *infra* Part II.

13. See *Payden v. United States*, 605 F. Supp. 839, 849 n.14 (S.D.N.Y.), *rev'd on other grounds*, 767 F.2d 26 (2d Cir. 1985); DePetris & Bachrach, *Forfeiture of Attorneys' Fees—A Responsible Approach*, *N.Y.L.J.*, June 19, 1985, at 4, col. 3 [hereinafter cited as DePetris & Bachrach].

14. See *United States v. Badalamenti*, 614 F. Supp. 194, 196-97 (S.D.N.Y. 1985).

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

they relate to attorneys' fees. The court in *Payden v. United States*<sup>16</sup> saw no statutory or constitutional obstacle to fee forfeiture. The courts in *United States v. Reckmeyer*,<sup>17</sup> *United States v. Ianniello*,<sup>18</sup> *United States v. Badalamenti*<sup>19</sup> and *United States v. Rogers*,<sup>20</sup> grappling with an inconclusive legislative history, and straining to circumvent the plain language of the statutes and concomitant constitutional problems, construed the statutes as inapplicable to legitimately paid legal fees.<sup>21</sup>

The RICO and CCE forfeiture statutes contain identical relation-back provisions under which "[a]ll right, title, and interest in property [subject to forfeiture] vests in the United States upon the commission of the act giving rise to forfeiture."<sup>22</sup> The property may be forfeited to the government even if it "is subsequently transferred to a person other than the defendant . . . unless the transferee establishes . . . that he is a bona fide purchaser for value . . . who at the time of purchase was reasonably without cause to believe that the property was subject to forfeiture."<sup>23</sup>

There is little doubt that an attorney pays value by agreeing to render services and thus satisfies the first requisite of the bona fide purchaser exception.<sup>24</sup> The crucial question, according to *United States v. Rogers*,<sup>25</sup> is the meaning of the requirement that the transferee be "reasonably without cause to believe that the property was subject to forfeiture."<sup>26</sup>

Employing perplexing logic, the court found this requirement ambiguous because the statutes do not specify what particular assets in the hands of transferees are subject to forfeiture.<sup>27</sup> The *Rogers* court inferred from the structure of the statutes that Congress intended that assets transferred to third parties be treated differently from assets in the hands of the defendant.<sup>28</sup> Unfortunately, observed the court, the statutes do

16. *Id.* The *Payden* decision involved fee forfeiture as justification for a subpoena addressed to an attorney. *See id.* at 843.

17. No. Cr. 85-00010-A, slip op. (E.D. Va. Mar. 27, 1986).

18. No. S 85 Cr. 115, slip op. (S.D.N.Y. Sept. 3, 1985).

19. 614 F. Supp. 194 (S.D.N.Y. 1985).

20. 602 F. Supp. 1332 (D. Colo. 1985).

21. *See Reckmeyer*, No. Cr. 85-00010-A, slip op. at 7-14 (modifying final order of forfeiture to exclude fees); *Ianniello*, No. S 85 Cr. 115, slip op. at 8-15 (granting motion to exclude fees from forfeiture and to modify a restraining order preventing payment of fees); *Badalamenti*, 614 F. Supp. at 196-97 (rejecting fee forfeiture as justification for subpoena to lawyer); *Rogers*, 602 F. Supp. at 1346-50 (granting motion to modify restraining order).

22. 18 U.S.C.A. § 1963(c) (West Supp. 1986); 21 U.S.C.A. § 853(c) (West Supp. 1986).

23. 18 U.S.C.A. § 1963(c) (West Supp. 1986); 21 U.S.C.A. § 853(c) (West Supp. 1986).

24. *United States v. Rogers*, 602 F. Supp. 1332, 1346 (D. Colo. 1985).

25. *Id.*

26. *See id.* at 1346 (quoting 18 U.S.C.A. § 1963(c) (West Supp. 1986); 21 U.S.C.A. § 853(c) (West Supp. 1986)).

27. *See Rogers*, 602 F. Supp. at 1347. "More specifically, the statute says nothing about whether attorney fees are forfeitable." *Id.*

28. *See id.*

not make clear what that different treatment is.<sup>29</sup> Hence, an attorney cannot tell from the text of the statutes whether the property transferred to him is subject to forfeiture.<sup>30</sup> The court, resorting to legislative history, determined that the statutes apply only to sham transfers—excessive transfers intended not as payment for legal services but as a means of sheltering assets from forfeiture.<sup>31</sup>

The restrictive *Rogers* holding would nullify the plain language of the relation-back provisions. If the statutes are ambiguous concerning the rights of attorney-transferees, they are equally ambiguous concerning the rights of any other transferee, and the sham limitation ought to apply to all transferees. This would render the objective notice provision in the statutes<sup>32</sup> surplusage by providing an exclusion for any good faith transferee. At any rate, the statutes do contain a plain definition of transferred property subject to forfeiture. Of property the defendant acquires in violation of the statutes, “[a]ny such property that is subsequently transferred to a person other than the defendant” may be forfeited.<sup>33</sup> Therefore, it should be clear to an attorney that tainted funds that the indictment identifies as being sought from the defendant can also be sought from the attorney.<sup>34</sup>

The requirement that the transferee be “reasonably without cause to believe” that the assets were wrongfully obtained on its face denies protection to a broad group of transferees who were party to no sham, but who, by dealing with suspicious persons, had reason to believe that property received was subject to forfeiture.<sup>35</sup> In *United States v. Badalamenti*,<sup>36</sup> the court, though it exempted legal fees from forfeiture, admitted that it had to overcome language in the statutes which strongly suggests that an attorney is subject to an objective notice standard:

The statute is apparently intended to dissuade the commercial world from dealing with racketeers and traffickers, warning that one who ac-

29. *See id.*

30. *Id.*

31. *See id.* at 1347-48. The court in *United States v. Ianniello*, No. S 85 Cr. 115, slip op. at 8-9 (S.D.N.Y. Sept. 3, 1985), agreed with the *Rogers* interpretation.

32. Transferred property is subject to forfeiture unless the transferee was “reasonably without cause to believe the property was subject to forfeiture.” 18 U.S.C.A. § 1963(c) (West Supp. 1986); 21 U.S.C.A. § 853(c) (West Supp. 1986).

33. *Id.* (emphasis added).

34. “The indictment or information itself gives notice of the government’s intent to seek forfeiture of the property.” 1984 Senate Report, *supra* note 5, at 203, reprinted in 1984 U.S. Code Cong. & Ad. News at 3386 (quoted in *Rogers*, 602 F. Supp. at 1343); *see also* *United States v. Raimondo*, 721 F.2d 476, 478 (4th Cir. 1983) (indictment notifies attorney that assets conveyed to him by defendant may represent profits of criminal enterprise), *cert. denied*, 105 S. Ct. 133 (1984). The description of property in the indictment need be no more specific than the generic language of 18 U.S.C.A. § 1963(a) (West Supp. 1986) and 21 U.S.C.A. § 853(a) (West Supp. 1986). *See Raimondo*, 721 F.2d at 477.

35. *See Payden v. United States*, 605 F. Supp. 839, 849 n.14 (S.D.N.Y.), *rev’d on other grounds*, 767 F.2d 26 (2d Cir. 1985).

36. 614 F. Supp. 194 (S.D.N.Y. 1985).

cepts dirty money in payment for goods or services may forfeit it. To the jeweler, for example, the statute says "Don't sell diamonds to a racketeer. You may lose the proceeds."

No one is more on notice of likelihood that the money may come from such prohibited activity than the lawyer who is asked to represent the defendant in the trial of the indictment.<sup>37</sup>

The court in *Payden v. United States* likewise noted that a lawyer cannot help but know that his fee may come from an illicit source, but unlike the *Badalamenti* court, held that attorneys' fees are subject to forfeiture.<sup>38</sup>

The legislative history of the relation-back provisions is scant<sup>39</sup> and there is even less indication of Congress' particular intent concerning attorneys' fees.<sup>40</sup> The court in *Rogers* relied on the Senate report<sup>41</sup> on the 1984 Comprehensive Crime Control Act<sup>42</sup> in support of its conclusion that the statutes reach only sham transactions.<sup>43</sup> The report stated that the purpose of the relation-back provisions was to "close a potential loophole in current law whereby the criminal forfeiture sanction could be avoided by transfers that were not 'arms' length' transactions."<sup>44</sup> It also noted that the bona fide purchaser provisions "should be construed to deny relief to third parties acting as nominees of the defendant or who have knowingly engaged in sham or fraudulent transactions."<sup>45</sup> The short passages in the Senate report certainly indicate that one of Congress' concerns was sham transfers; it is a long leap, however, to conclude that prohibiting sham transfers was the exclusive purpose of the statutes.<sup>46</sup>

As evidence of Congress' sensitivity to sixth amendment rights in for-

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37. *Id.* at 196.

38. "One who receives funds with the knowledge that the funds are subject to forfeiture cannot be said to have entered into an arms length transaction regardless of the price paid for the good or service." 605 F. Supp. at 849 n. 14.

39. See *United States v. Ianniello*, No. S 85 Cr. 115, slip op. at 8 (S.D.N.Y. Sept. 3, 1985); *United States v. Badalamenti*, 614 F. Supp. 194, 196 (S.D.N.Y. 1985).

40. See *United States v. Ianniello*, No. S 85 Cr. 115, slip op. at 8 (S.D.N.Y. Sept. 3, 1985).

41. 1984 Senate Report, *supra* note 5, reprinted in 1984 U.S. Code Cong. & Ad. News at 3182 (cited in *United States v. Rogers*, 602 F. Supp. 1332, 1347 (D. Colo. 1985); *United States v. Ianniello*, No. S 85 Cr. 115, slip op. at 8 (S.D.N.Y. Sept. 3, 1985)).

42. Pub. L. No. 98-473, 98 Stat. 1837 (1984).

43. See *supra* note 31 and accompanying text.

44. 1984 Senate Report, *supra* note 5, at 200-01, reprinted in 1984 U.S. Code Cong. & Ad. News at 3383-84.

45. *Id.* at 209 n.47, reprinted in 1984 U.S. Code Cong. & Ad. News at 3392 n.47.

46. There is no inconsistency in prohibiting sham transfers and also imposing an objective notice standard on transferees. Indeed, the legislative history also contains reference to an objective standard. See *id.* at 209, reprinted in 1984 U.S. Code Cong. & Ad. News at 3392 (transferee's claims to property will prevail only when the transferee "had no reason to believe that the property was subject to forfeiture") (quoted in *Payden v. United States*, 605 F. Supp. 839, 849 n.14 (S.D.N.Y.), *rev'd on other grounds*, 767 F.2d 26 (2d Cir. 1985)).

feiture cases, *Rogers* quoted<sup>47</sup> a footnote in the House report<sup>48</sup> on a related bill, the Comprehensive Drug Penalty Act of 1984.<sup>49</sup> In discussing section 415(j), authorizing courts to enter restraining orders to protect the availability of property that might be subject to forfeiture, the House Judiciary Committee wrote: "Nothing in this section is intended to interfere with a person's Sixth Amendment right to counsel."<sup>50</sup> The *Rogers* decision ignored the very next sentence in the report: "The Committee, therefore, does 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."<sup>51</sup> *Payden* inferred from the House report that Congress did not try to resolve the sixth amendment conflict, but rather left the issue to the courts.<sup>52</sup>

Examination of the broad legislative policy underlying the forfeiture statutes is more helpful in resolving the attorney fee question than is a microscopic analysis of the legislative history of the 1984 relation-back amendments.<sup>53</sup> The fundamental purpose of the forfeiture statutes is to strip organized crime of its economic power.<sup>54</sup> Denying RICO and CCE defendants the ability to use tainted assets to obtain the best defense available conforms to this policy.<sup>55</sup> By paying an attorney, RICO or CCE defendants diminish their economic power by spending money on something they would rather not; yet the purpose of the statutes is not being accomplished because the defendants receive valuable legal services in return. To suggest that payment of attorneys' fees realizes the goals of the forfeiture statutes, by reducing the criminal organization's net income, is to treat defense costs as a business expense deductible from forfeiture liability.

*United States v. Badalamenti* found the legislative history of the statutes unclear<sup>56</sup> and acknowledged that "a literal reading of the two forfeiture statutes would seem to encompass the legal fee."<sup>57</sup> Nonetheless, the *Badalamenti* court exempted the fee from forfeiture, explaining that fee forfeiture would raise such constitutional and ethical problems, that the

47. See 602 F. Supp. at 1347-48.

48. See H.R. Rep. No. 845, pt. 1, 98th Cong., 2d Sess. 19 n.1 (1984).

49. H.R. 4901, 98th. Cong., 2d Sess. (1984).

50. H.R. Rep. No. 845, pt. 1, 98th Cong. 2d Sess. 19 n.1 (1984).

51. *Id.* The committee referred to *United States v. Mandel*, 408 F. Supp. 679 (D. Md. 1976) and *United States v. Bello*, 470 F. Supp. 723 (S.D. Cal. 1979).

52. See 605 F. Supp. at 850 n.14.

53. Congress intended the RICO statute to be construed broadly. *Sedima, S.P.R.L. v. Imrex Co.*, 105 S. Ct. 3275, 3286 (1985); *United States v. Ginsburg*, 773 F.2d 798, 802 (7th Cir. 1985).

54. See *supra* note 5 and accompanying text.

55. Just as the defendant cannot be permitted to 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 tainted funds. *Payden*, 605 F. Supp. at 850 n.14.

56. See 614 F. Supp. 194, 197 (S.D.N.Y. 1985) ("Nothing of great value to the resolution has been cited from legislative history.")

57. *Id.* at 196; accord *United States v. Reckmeyer*, No. Cr. 85-00010-A, slip op. at 8 (E.D. Va. Mar. 27, 1986).

court could not conceive that Congress intended forfeiture of attorneys' fees.<sup>58</sup>

The *Badalamenti* court, by forthrightly stating the basis of its interpretation of the statutes, avoided the strained *Rogers* reading of the text and legislative history.<sup>59</sup> Though its ultimate result was an unnecessarily narrow construction of the statutes, the *Badalamenti* court was correct in looking to the sixth amendment for guidance in construing the statutes. The plain language of the statutes and the lack of evidence of a clear legislative intent to exclude attorneys' fees from forfeiture demand the conclusion that the statutes were intended to apply to the fees. The Constitution therefore controls the extent to which legal fees are forfeitable.

## II. CONSTITUTIONAL PROBLEMS

The sixth amendment, as interpreted in the landmark decision *Powell v. Alabama*,<sup>60</sup> requires for a conviction to be valid that a criminal defendant be afforded the opportunity to be represented by effective counsel.<sup>61</sup> It has been argued that forfeiture of attorneys' fees interferes with that right in several ways: by making it impossible for a defendant to retain counsel of his choosing;<sup>62</sup> by undermining the effectiveness of counsel by placing him in a position of conflict;<sup>63</sup> and by chilling attorney-client communication.<sup>64</sup>

### A. Choice of Counsel

The most serious constitutional conflict created by the forfeiture of attorneys' fees is that the threat of forfeiture hinders a defendant's efforts to hire a lawyer. Private counsel may refuse to take a case if there is a possibility that his fee will be seized.<sup>65</sup> Counsel's dilemma is especially acute in RICO and CCE cases where the fee and time investment are often large and the odds of acquittal poor.<sup>66</sup>

An outgrowth of the right to effective counsel is that in most cases, if a

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58. See 614 F. Supp. at 196; *Reckmeyer*, No. Cr. 85-00010-A, slip op. at 8 (E.D. Va. Mar. 27, 1986).

59. See *supra* notes 33-38.

60. 287 U.S. 45 (1932).

61. See *id.* at 53; see also *Estelle v. Smith*, 451 U.S. 454, 469 (1981).

62. See *infra* Part II.A.

63. See *infra* Part II.B.

64. See *infra* Part II.C.

65. *United States v. Ianniello*, No. S 85 Cr. 115, slip op. at 11 (S.D.N.Y. Sept. 3, 1985); *United States v. Badalamenti*, 614 F. Supp. 194, 196 (S.D.N.Y. 1985).

66. See Association of the Bar of the City of New York Committee on Criminal Advocacy, *The Issuance of Subpoenas Upon Lawyers in Criminal Cases by State and Federal Prosecutors: A Call for Immediate Remedial Action* app. 9 n.78 (1985) (law firm cannot survive if fees for big criminal cases are contingent on success, where there is a 90% conviction rate) [hereinafter cited as Bar Association Report]. A Justice Department study shows that of 9164 federal prosecutions for drug offenses in 1983, defendants were convicted in 7490, or 82%, of those cases. See Bureau of Justice Statistics, U.S. Dep't of Justice, *Sourcebook of Criminal Justice Statistics* 564 (1984).



defendant can afford to retain counsel, he has the right to counsel of his choosing.<sup>67</sup> The right to choice of counsel is not, however, absolute.<sup>68</sup> It must sometimes give way to competing interests such as the avoidance of ethical conflicts,<sup>69</sup> the need for evidence<sup>70</sup> and the efficient and orderly administration of justice.<sup>71</sup> The public interest in preserving the court's jurisdiction over forfeitable assets seems at least as weighty an interest as any of these.<sup>72</sup>

The RICO defendant's main problem is not merely inability to retain a particular lawyer, but inability to retain any lawyer.<sup>73</sup> Appointed counsel would then be available,<sup>74</sup> but some courts and commentators have doubted the effectiveness of appointed counsel in RICO and CCE cases.<sup>75</sup> The court in *United States v. Rogers* noted that the costs of a RICO defense are high and that the resources and expertise of the average federal public defender's office might be insufficient to meet the

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67. *Crooker v. California*, 357 U.S. 433, 439 (1958), *overruled on other grounds*, *Miranda v. Arizona*, 384 U.S. 436 (1966); *Powell v. Alabama*, 287 U.S. 45, 53 (1932); *United States v. Agosto*, 675 F.2d 965, 969 (8th Cir.), *cert. denied*, 459 U.S. 834 (1982); *United States v. Burton*, 584 F.2d 485, 488-89 (D.C. Cir. 1978), *cert. denied*, 439 U.S. 1069 (1979).

68. *Linton v. Perini*, 656 F.2d 207, 209 (6th Cir. 1981), *cert. denied*, 454 U.S. 1162 (1982); *United States v. Burton*, 584 F.2d 485, 489 (D.C. Cir. 1978), *cert. denied*, 439 U.S. 1069 (1979); *Gandy v. Alabama*, 569 F.2d 1318, 1323 (5th Cir. 1978).

69. *See United States v. James*, 708 F.2d 40, 43-44, 46 (2d Cir. 1983) (defendant's chosen counsel disqualified because he had represented prosecution witness).

70. *See Roe v. United States*, 781 F.2d 238, 250-51 (2d Cir. 1986) (en banc) (attorney may have to disclose fee information even though this might force his disqualification), *cert. denied*, 54 U.S.L.W. 3660 (U.S. Apr. 8, 1986).

71. *United States v. Burton*, 584 F.2d 485, 489-90 (D.C. Cir. 1978) (one of two retained counsel withdraws; continuance denied), *cert. denied*, 439 U.S. 1069 (1979); *United States v. Tortora*, 464 F.2d 1202, 1206, 1210 (2d Cir.) (continuance to accommodate defendant's chosen counsel's other trial and army reserve obligations during period scheduled for trial denied), *cert. denied*, 409 U.S. 1063 (1972); *United States v. Hampton*, 457 F.2d 299, 301 (7th Cir.) (on eve of trial, indigent defendant's mother gives defendant money; continuance to substitute retained counsel for appointed counsel denied), *cert. denied*, 409 U.S. 856 (1972).

72. The importance of preserving the court's control over suspect assets was recognized in 1984 Senate Report, *supra* note 5, at 195, *reprinted in* 1984 U.S. Code Cong & Ad. News at 3378, and in *United States v. Long*, 654 F.2d 911, 915 (3d Cir. 1981).

73. *United States v. Badalamenti*, 614 F. Supp. 194, 197-98 (S.D.N.Y. 1985).

74. *See Payden v. United States*, 605 F. Supp. 839, 853 & n.19 (S.D.N.Y.), *rev'd on other grounds*, 767 F.2d 26 (2d Cir. 1985); *United States v. Bello*, 470 F. Supp. 723, 725 (S.D. Cal. 1979). The court in *United States v. Badalamenti*, 614 F. Supp. 194 (S.D.N.Y. 1985), worried that since the defendant was not actually indigent, he could not avail himself of appointed counsel. *See id.* at 197; *United States v. Ianniello*, No. S 85 Cr. 115, slip op. at 11-12 (S.D.N.Y. Sept. 3, 1985). It is puzzling that the *Badalamenti* court saw broad implied protections of the right to counsel in the forfeiture statutes but took such a niggardly view of the right to appointed counsel under the Criminal Justice Act, 18 U.S.C. § 3006A (1982). The *Badalamenti* court might be reluctant to follow its own stern dictum in actually deciding whether the Criminal Justice Act applies to defendants rendered constructively indigent by government action.

75. *See United States v. Rogers*, 602 F. Supp. 1332, 1349-50 (D. Colo. 1985); Bar Association Report, *supra* note 66, at 24.

challenge.<sup>76</sup>

The court in *Payden v. United States* rejected the idea that appointed counsel is inherently unfit to handle complex criminal cases.<sup>77</sup> Further, that forfeiture cases are usually "big cases requiring months to prepare and try"<sup>78</sup> would not in itself seem to be a problem unless already over-taxed public defenders were swamped by an influx of giant RICO cases.<sup>79</sup> And, while the defendant's preference for the lawyer who represented him during the grand jury investigation is understandable,<sup>80</sup> this does not mean that any other trial representation is constitutionally inadequate.<sup>81</sup>

Fee forfeiture poses a challenge of another sort to the system of court-appointed criminal representation. Specialists accustomed to more lucrative fees will not be attracted by the rates paid appointed counsel under the Criminal Justice Act (CJA).<sup>82</sup> But getting the right kind of specialist to work as appointed counsel is part of a larger problem—getting a lawyer at all.<sup>83</sup> Because of the time and effort involved,<sup>84</sup> being appointed

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76. The *Rogers* court wrote:

The retort to the claim of denial of counsel of one's choice, that appointed counsel is available, pays no more than lip service to due process and the right to counsel. . . . The costs of mounting a defense of an indictment under RICO are far beyond the resources or expertise of the average federal public defender's office which is already overtaxed. Ignoring the complexity of the legal issues involved, the defense of RICO accusations requires the marshalling of facts and information of vast quantities perhaps constituting the whole of several worldwide business enterprises. . . . Adequate defense of RICO cases generally requires representation during grand jury investigations lasting as long as two or three years. Counsel appointed ninety or one hundred and twenty days before trial is patently inadequate.

602 F. Supp. at 1349-50.

77. 605 F. Supp. 839, 853 n.19 (S.D.N.Y.) (citing *United States v. Bello*, 470 F. Supp. 723, 725 (S.D. Cal. 1979)), *rev'd on other grounds*, 767 F.2d 26 (2d Cir. 1985).

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

79. A substantial increase in workload undeniably would affect the overall quality of public representation. The proposal in this Note is designed to avoid overburdening Legal Aid as a result of fee forfeiture. See *infra* note 186.

80. See Bar Association Report, *supra* note 66, at 24; *cf.* *United States v. Cunningham*, 672 F.2d 1064, 1068-71 (2d Cir. 1982) (defendant's interest in particular "repeatedly victorious" counsel with whom he had long relationship outweighed possible conflict of interest resulting from same attorney's previous representation of prosecution witness), *cert. denied*, 466 U.S. 951 (1984).

81. See *United States v. James*, 708 F.2d 40, 44-45 (2d Cir. 1983) (same situation as *United States v. Cunningham*, 672 F.2d 1064 (2d Cir. 1982), *cert. denied*, 466 U.S. 951 (1984), see *supra* note 80, but interests of government, witness and the public in this case outweigh defendant's interest in particular trusted counsel); *United States v. Bello*, 470 F. Supp. 723, 725 (S.D. Cal. 1979) (court distinguishes right to counsel of choice from right to counsel in general). Moreover, appointment of counsel after indictment does not give the government an unfair head start. Contrary to the suggestions of the *Rogers* court, see *supra* note 76 and accompanying text, the sixth amendment does not guarantee counsel during grand jury proceedings. See *Kirby v. Illinois*, 406 U.S. 682, 687-89 (1972) (plurality opinion); *Roe v. United States*, 781 F.2d 238, 244 (2d Cir. 1986) (en banc), *cert. denied*, 54 U.S.L.W. 3660 (U.S. Apr. 8, 1986).

82. 18 U.S.C.A. § 3006A (West 1985). CJA permits a maximum rate of \$60 per hour for time in court and \$40 per hour for time outside. See *id.* § 3006A(d).

83. See *supra* note 73 and accompanying text.

counsel in a RICO or CCE case at CJA rates is a pro bono commitment few lawyers, even altruistic ones, would be willing to accept.

Another concern related to the choice of counsel issue is that fee forfeiture may lead to abuse of the adversary system.<sup>85</sup> Subjecting attorneys' fees to forfeiture creates the opportunity for the government to use forfeiture as a means to knock out the most skillful advocate for the defense and thus "eliminate the adversary from the adversary process."<sup>86</sup> In addition to giving the government the "ultimate tactical advantage of being able to exclude competent defense counsel as it chooses,"<sup>87</sup> the statutes could also be used to target unpopular attorneys.<sup>88</sup>

The Department of Justice, in response to the furor raised by the defense bar, has adopted standards for seeking fee forfeiture.<sup>89</sup> Federal prosecutors will seek fee forfeiture only when they have reason to believe that a defense lawyer had actual knowledge that payment came from the proceeds of crime.<sup>90</sup> This policy should reduce the number of cases in which forfeiture is sought and preclude prosecutors from arbitrarily appending a forfeiture count to an indictment to scare off potential counsel. The court in *United States v. Rogers*, however, took the view that the mere possibility of abuse is intolerable.<sup>91</sup> While the court presumed that most prosecutors act in good faith, it could not ignore "the potential for prosecutorial manipulation."<sup>92</sup> Even so, this problem should not lead us to a hasty conclusion. Less drastic remedies for this kind of prosecutorial misconduct are available.<sup>93</sup>

### B. Conflicts of Interest

Even if a defendant can get a lawyer to take his case, the retained lawyer's effectiveness as a vigorous advocate may be diminished because fee forfeiture places the attorney in a position of conflict.<sup>94</sup> One attribute of the effective counsel guaranteed by *Powell* is freedom from conflicts of

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84. See *supra* note 66 and accompanying text.

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

86. *Id.* at 1350. The court in *Payden* did not share the *Rogers* court's fears, in light of a strong caution to the government against attorney shopping. See 605 F. Supp. at 853.

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

88. Bar Association Report, *supra* note 66, at 30-31.

89. See *Justice Department Guidelines on Forfeiture of Attorneys' Fees*, 38 Crim. L. Rep. (BNA) 3001 (Oct. 2, 1985).

90. *Id.* at 3004. "Actual knowledge," as used in the Justice Department guidelines, is not a completely subjective test. An attorney has actual knowledge that an asset is subject to forfeiture if he knows that the government *has asserted* that the particular asset is subject to forfeiture. *Id.* at 3004. However, the description of the claimed property must be specific. An all-inclusive forfeiture allegation does not in itself satisfy the "actual knowledge" requirement of the guidelines. See *id.* at 3005.

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

92. *Id.*

93. See *infra* note 134.

94. See *United States v. Ianniello*, No. S 85 Cr. 115, slip op. at 13-14 (S.D.N.Y. Sept. 3, 1985); *United States v. Badalamenti*, 614 F. Supp. 194, 196 (S.D.N.Y. 1985).

interest.<sup>95</sup> In the fee-forfeiture case the attorney's representation of his client might be influenced by the attorney's desire to preserve his fee.<sup>96</sup> It has been suggested that a lawyer may be motivated to negotiate a plea bargain more attractive to the lawyer than the client.<sup>97</sup> The lawyer might bargain for a guilty plea not involving forfeiture of the fee<sup>98</sup> or, unable to strike such a deal, advise going to trial when a guilty plea would better serve his client.<sup>99</sup>

The situation created by the possibility of fee forfeiture has been likened to a contingent fee arrangement,<sup>100</sup> which is banned in a criminal case by the Model Code of Professional Responsibility.<sup>101</sup> It is uncertain, however, if the public policies behind the rule are relevant in the fee-forfeiture situation. The rule against contingent fees in criminal cases has been stated in dicta<sup>102</sup> and by commentators,<sup>103</sup> but the holdings are so few and so old that "it is doubtful that there can be said to be any current law on the subject."<sup>104</sup> The most frequently stated rationales are that a contingent fee in a criminal case creates potential for corruption of justice<sup>105</sup> and that legal services in a criminal case do not produce a res or fund out of which the fee can be paid.<sup>106</sup>

The corruption question has come up in connection with contingent

95. See *Wood v. Georgia*, 450 U.S. 261, 271-72 (1981) (party with interest possibly adverse to defendant retains lawyer for defendant); *Cuyler v. Sullivan*, 446 U.S. 335, 345 (1980) (multiple defendants represented by same lawyer); *Holloway v. Arkansas*, 435 U.S. 475, 481-82 (1978) (same); *Glasser v. United States*, 315 U.S. 60, 76 (1942) (same).

96. See *United States v. Ianniello*, No. S 85 Cr. 115, slip op. at 13-14 (S.D.N.Y. Sept. 3, 1985); *United States v. Badalamenti*, 614 F. Supp. 194, 196-97 (S.D.N.Y. 1985).

97. See *United States v. Ianniello*, No. S 85 Cr. 115, slip op. at 13-14 (S.D.N.Y. Sept. 3, 1985); *United States v. Badalamenti*, 614 F. Supp. 194, 196-97 (S.D.N.Y. 1985).

98. See *United States v. Ianniello*, No. S 85 Cr. 115, slip op. at 13-14 (S.D.N.Y. Sept. 3, 1985); *United States v. Badalamenti*, 614 F. Supp. 194, 196-97 (S.D.N.Y. 1985).

99. *United States v. Ianniello*, No. S 85 Cr. 115, slip op. at 13-14 (S.D.N.Y. Sept. 3, 1985); *Payden v. United States*, 605 F. Supp. 839 (S.D.N.Y.), *rev'd on other grounds*, 767 F.2d 26 (2d Cir. 1985), suggested as a solution to the conflict problem that the trial be bifurcated, with separate proceedings for guilt and forfeiture. See *id.* at 850 n.14. A disinterested attorney would represent the defendant in the forfeiture portion of the trial. *Id.* This proposal is not directed at the evil to be avoided. Tainting of the trial is not the problem. Corruption of the plea bargaining process is. Though it is conceivable that the attorney whose fee is subject to forfeiture may deliberately or unconsciously direct more of his efforts toward avoiding forfeiture than obtaining acquittal, the effect this could have on a jury's determination is remote.

100. See *United States v. Ianniello*, No. S 85 Cr. 115, slip op. at 13 (S.D.N.Y. Sept. 3, 1985); *United States v. Badalamenti*, 614 F. Supp. 194, 196 (S.D.N.Y. 1985).

101. Model Code of Professional Responsibility DR 2-106(C) (1983).

102. See *Couture v. Mammoth Groceries, Inc.*, 117 N.H. 294, 296, 371 A.2d 1184, 1186 (1977).

103. See 6A A. Corbin, *Contracts* § 1424, at 366-67 (1962).

104. F. MacKinnon, *Contingent Fees for Legal Services* 52 (1964). The problem rarely arises because criminal defense attorneys usually demand their fees before trial, when the defendant has some interest in paying. *Id.*

105. See *Peyton v. Margiotti*, 398 Pa. 86, 90, 156 A.2d 865, 867 (1959); Model Code of Professional Responsibility DR 2-106(C) n.90 (1983).

106. Model Code of Professional Responsibility EC 2-20 (1983).

fees for the use of personal influence to procure pardons.<sup>107</sup> However, personal influence is to no significant extent one of the services a lawyer renders in a criminal case.<sup>108</sup> It is also not clear that the *res* argument is particularly apt if the lawyer is helping to preserve a *res* from forfeiture.<sup>109</sup>

The argument that fee forfeiture violates the contingent fee ban lacks independent force. Whatever the traditional policies against contingent fees in a criminal case, the practical distinction between a "contingent" forfeitable fee and a permissible contingent fee in a civil case is that in the fee-forfeiture case there is the potential, albeit slight, for divergence of interest of the client and attorney.<sup>110</sup> This simply restates the conflict argument.

*Payden v. United States*, in dismissing the conflict problem, emphasized the rule that a lawyer must continue to represent his client vigorously even if the client might not be able to pay.<sup>111</sup> The Model Code of Professional Responsibility permits a lawyer to withdraw from a case only in certain situations<sup>112</sup> enumerated in certain disciplinary rules.<sup>113</sup> The particularly relevant provision permits withdrawal if the client "[d]eliberately disregards an agreement or obligation to the lawyer as to expenses or fees."<sup>114</sup> The client's unintentional inability to pay his fees does not fall within any category of permissive withdrawal.

The problem with the *Payden* view is that it assumes a defendant has already obtained a lawyer and it ignores the strand running through the rules that a lawyer should not put himself in a position where his ethics will be put to the test.<sup>115</sup> Though the rules mandate that once a lawyer has committed himself to a client he must continue, they also tell the

107. See *Peyton v. Margiotti*, 398 Pa. 86, 90-91, 156 A.2d 865, 867 (1959).

108. Remission of forfeiture by the executive branch is akin to a pardon. See 17 C.J.S. *Contracts* § 214(b) (1963). While a good working relationship with the prosecutor's office is helpful, the attorneys' fees discussed in this Note can hardly be said to be for influence peddling.

109. A contingent fee contract for the defense of an unliquidated tort damage claim, where the fee was to be a fraction of the difference between the plaintiff's claim and the amount actually awarded, was held void because the factors on which the fee depended bore "no logical relationship to the value of the services." *Wunschel Law Firm v. Claibough*, 291 N.W.2d 331, 337 (Iowa 1980). Plaintiffs in tort actions may make unreasonably large claims. See *id.* at 336. Grand juries should be relied on to show more restraint in rendering an indictment with a forfeiture count than a civil plaintiff in fashioning an *ad damnum* clause in a complaint.

110. See *supra* notes 94-99 and accompanying text.

111. See *Payden v. United States*, 605 F. Supp. 839, 848-49 (S.D.N.Y.) (citing *United States v. Ramey*, 559 F. Supp. 60, 62 (E.D. Tenn. 1981)), *rev'd on other grounds*, 767 F.2d 26 (2d Cir. 1985).

112. See Model Code of Professional Responsibility DR 7-101(A)(2) (1983).

113. See *id.* DR 2-110(C) (various reasons for permissive withdrawal); *id.* DR 5-102 (lawyer as witness); *id.* DR 5-105 (lawyer with personal stake in litigation).

114. *Id.* DR 2-110(C)(1)(f) (emphasis added).

115. See, e.g., *id.* DR 5-101 (lawyer should refuse employment when his own interest may impair his independent professional judgment); *id.* DR 5-103 (lawyer should avoid acquiring an interest in litigation he is conducting for a client).

lawyer to avoid involving himself in cases of potential conflict in the first place.<sup>116</sup>

The conflict problem is, however, more an academic legal matter than a practical problem. First, the argument that a RICO or CCE defendant may be deceived into accepting a plea bargain that sends him to prison but assures his lawyer a fee is a poor compliment to the intelligence of defendants. Second, we should have some faith in the pride and integrity of the bar or at least the ability of the bar to police itself. To arrange a plea that benefits the lawyer and unnecessarily sends the client to prison is a bad way to attract business and a good way to be disbarred.<sup>117</sup> Third, if the RICO or CCE defendant obtains a lawyer, the lawyer is not likely to be motivated by the opportunity to make a quick fee by negotiating a plea not involving forfeiture.<sup>118</sup> The threat posed by the unscrupulous stranger is fanciful, and the danger that a well-intentioned and trusted attorney may succumb to temptation is outweighed by the defendant's qualified right to counsel of his own choice, on terms to which he intelligently assents.<sup>119</sup>

### C. *Chill on Attorney-Client Communication*

Another way in which the statutes may diminish the effectiveness of retained counsel is by interfering with attorney-client communication.<sup>120</sup> The forfeiture statutes put the onus on the third party transferee to prove his bona fide purchaser status at a post-trial hearing.<sup>121</sup> It has been con-

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116. *See id.* DR 5-101; *id.* DR 5-103.

117. Abandoning the client's cause while professing otherwise to the client is a ground for disbarment. *See, e.g.,* Fitzpatrick v. State Bar, 20 Cal.3d 73, 84-86, 88, 569 P.2d 763, 768-69, 771, 141 Cal. Rptr. 169, 174-75, 177 (1977); *In re Miller*, 54 A.D.2d 69, 70, 387 N.Y.S.2d 445, 445-446 (1976). Abandonment is an understated way of describing betrayal of a client for a fee.

118. The risk of receiving no fee would dissuade all but the most venturesome, unscrupulous or desperate lawyers from taking the case. *See supra* notes 65-66 and accompanying text.

119. *Cf. Maxwell v. Superior Ct.*, 30 Cal. 3d 606, 612-22, 639 P.2d 248, 251-58, 180 Cal. Rptr. 177, 180-87 (1982) (counsel represented indigent defendant in exchange for publication rights to defendant's story; court, while criticizing the fee arrangement, held that disqualification of counsel of choice was not required where the defendant, aware of and competent to evaluate the potential conflicts, willingly entered the fee arrangement). In attempting to reverse a conviction because of ineffective assistance of counsel, a defendant has a heavier burden in the case of a lawyer's financial conflict resulting from a fee arrangement into which the defendant entered willingly than in a multiple representation case, where the defendant cannot be assumed to know as well as his lawyer how his defense will conflict with another defendant's. *See United States v. Marrera*, 768 F.2d 201, 207 (7th Cir. 1985) (share of movie rights). Some may question if a defendant's decision can be called willing when his options are appointed counsel or conflict-ridden retained counsel. But to say that the defendant is given Hobson's choice is to make the erroneous assumption that appointed counsel is constitutionally inadequate. *See supra* notes 77-81 and accompanying text.

120. *See United States v. Badalamenti*, 614 F. Supp. 194, 196 (S.D.N.Y. 1985); *United States v. Rogers*, 602 F. Supp. 1332, 1348-49 (D. Colo. 1985).

121. *See* 18 U.S.C.A. § 1963(c), (m) (West Supp. 1986); 21 U.S.C.A. § 853(c), (n) (West Supp. 1986).

tended that if the attorney may later have to testify about his knowledge of the source of fees, he may be reluctant to inquire fully into his client's activities.<sup>122</sup> The resulting impediment to full, frank attorney-client communication is in a sense a facet of the conflict of interest problem. Here, the duty to become well informed conflicts with the interest in remaining a bona fide purchaser.

Attorney-client communication would be hampered only if the attorney had to testify at a forfeiture hearing about his knowledge of the defendant's assets.<sup>123</sup> This problem arises only under a restrictive interpretation of the statutes, such as one allowing fee forfeiture only when the attorney is party to a sham<sup>124</sup> or accepts the fee with actual knowledge that the fee was illegally obtained. So construed, the statutes would require inquiry into the lawyer's state of mind and the circumstances surrounding payment of the fee.<sup>125</sup>

Under an objective standard of good faith it is not necessary to determine the lawyer's intent or knowledge.<sup>126</sup> It suffices for forfeiture liability that the attorney have reason to believe that the fee was forfeitable.<sup>127</sup> An indictment with a forfeiture count is notice of the government's claim to the attorney's fee.<sup>128</sup>

### III. USE OF A PRETRIAL HEARING TO ALLEVIATE THE CONSTITUTIONAL PROBLEMS

The serious constitutional objection to fee forfeiture is that it restricts a defendant's access to retained counsel. This infirmity deserves more consideration than the *Payden v. United States*<sup>129</sup> court gave it.<sup>130</sup> Contrary to the suggestions in the four cases that exempted fees from forfeiture,<sup>131</sup> however, the constitutional difficulties do not preclude enforcement of

122. See *United States v. Badalamenti*, 614 F. Supp. 194, 196 (S.D.N.Y. 1985); *United States v. Rogers*, 602 F. Supp. 1332, 1348-49 (D. Colo. 1985).

123. DePetris & Bachrach, *supra* note 13, at 4, col. 4. An equally significant intrusion into the attorney-client relationship is possible when the fee is used as evidence of the client's guilt, as when defendant, with no legitimate source of income, pays large legal fees. The Second Circuit has stated that an attorney may be compelled to turn over fee information though doing so might require his testimony at trial and result in his disqualification. See *Roe v. United States*, 781 F.2d 238, 250-51 (2d Cir. 1986) (en banc), *cert. denied*, 54 U.S.L.W. 3660 (U.S. Apr. 8, 1986).

124. See *United States v. Ianniello*, No. S 85 Cr. 115, slip op. at 15 (S.D.N.Y. Sept. 3, 1985); *United States v. Rogers*, 602 F. Supp. 1332, 1347-48 (D. Colo. 1985).

125. See DePetris & Bachrach, *supra* note 13, at 4, col. 4.

126. See *supra* notes 32-38 and accompanying text.

127. See *supra* notes 32-38 and accompanying text.

128. See *supra* note 34.

129. 605 F. Supp. 839, 849 n. 14 (S.D.N.Y.), *rev'd on other grounds*, 767 F.2d 26, 29 (2d Cir. 1985).

130. See *id.*

131. See *United States v. Reckmeyer*, No. Cr. 85-00010-A, slip op. at 8-9 (E.D. Va. Mar. 27, 1986); *United States v. Ianniello*, No. S 85 Cr. 115, slip op. at 14-15 (S.D.N.Y. Sept. 3, 1985); *United States v. Badalamenti*, 614 F. Supp. 194, 198 (S.D.N.Y. 1985); *United States v. Rogers*, 602 F. Supp. 1332, 1349-50 (D. Colo. 1985).

the statutes against otherwise legitimate legal fees. Unfortunately, the courts addressing the fee-forfeiture question declined to consider less drastic remedies that would protect the defendant's rights while still effectuating the purpose of the forfeiture statutes.

To reach a constitutional result, the courts need only have found in the statutes an implied requirement for a pretrial hearing regarding fee forfeiture.<sup>132</sup> In so doing, they would have followed a procedure established in cases of RICO and CCE preliminary injunctions.<sup>133</sup> A hearing, focusing on the strength of the government's claim to the assets sought, would balance, on the one hand, the defendant's constitutional right to counsel, and on the other, the strong government interest in preserving the court's ability to impose the forfeiture sanction, and would prevent the government from using fee forfeiture abusively.<sup>134</sup>

Since the pretrial deprivation of rights in the case of fee forfeiture is caused by the prospect of the post-conviction penalty, if the defendant prevails at the pretrial hearing the court would immediately exempt the fees from forfeiture, even if the defendant should subsequently be convicted and a verdict of forfeiture rendered. Creating a permanent exemption is the only way to make the hearing a meaningful protection of a defendant's rights. If the defendant loses the hearing, he would be represented by appointed counsel or by his chosen attorney. The chosen attorney would be paid at appointed counsel rates but be eligible for his entire agreed fee if the defendant prevails at trial.<sup>135</sup>

The fee-forfeiture hearing is a major modification of the statutes. Unlike a preliminary injunction order, which maintains the status quo so that the defendant may forfeit his assets upon a judgment of forfeiture, the order resulting from a fee-forfeiture hearing precludes the court from imposing the ultimate forfeiture sanction. Congress has allowed courts little discretion to reduce the forfeiture penalty.<sup>136</sup> However, Congress

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132. Such an approach is advocated in DePetris & Bachrach, *supra* note 13, at 4, col. 1-2. As a precondition for holding such a hearing, the defendant should have to swear that he has no assets from which to pay a fee besides those the government is seeking. *Id.* at 4, col. 3.

133. See *infra* notes 141-52 and accompanying text.

134. For a discussion of the problem of government "attorney shopping," see *supra* notes 85-91 and accompanying text. A hearing requirement would prevent the government from using a mere indictment with a forfeiture count to harass a particular defendant or lawyer. It is improbable that the government would endanger its witnesses and disclose its trial strategy at a pretrial hearing just to spite a defendant. See *infra* notes 154-55 and accompanying text. Further, it may be within the district court's supervisory powers to exempt fees from forfeiture that is sought maliciously. *Cf. In re Grand Jury Matters*, 751 F.2d. 13, 15-16, 19 (1st Cir. 1984) (district court did not abuse discretion in quashing fee information subpoena obtained to harass defendant and his lawyer).

135. See *infra* Part III.D.

136. Though courts have wide discretion in fashioning preliminary procedures, see *United States v. L'Hoste*, 609 F.2d 796, 811 (5th Cir.), *cert. denied*, 449 U.S. 833 (1980); *United States v. Veon*, 538 F. Supp. 237, 242-43 (E.D. Cal. 1982); 18 U.S.C.A. § 1963(e) (West Supp. 1986); 21 U.S.C.A. § 853(e) (West Supp. 1986), forfeiture sanctions are mandatory and courts have no authority to remit forfeiture. *L'Hoste*, 609 F.2d at 811-12.



also specifically intended that the statutes be applied in accordance with the sixth amendment.<sup>137</sup> An implied hearing requirement achieves that purpose through less radical a modification than an absolute exemption of attorneys' fees from forfeiture.<sup>138</sup>

#### A. *The Long Hearing Requirement for Pretrial Injunctions Under RICO and CCE*

The predicament of the accused RICO or CCE offender who is shunned by defense counsel because of the possibility of seizure of fees resembles that of a defendant whose assets are frozen by a pretrial injunction. The defendant who cannot get a lawyer to take his money has had his assets as effectively frozen as though he were enjoined from transferring the money. Prior to the relation-back amendments, there was little case law concerning the effect of preliminary injunctions on the right to counsel.<sup>139</sup> However, due process protections developed in injunction cases provide a model for resolving the fee-forfeiture problem.

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137. This is one point on which the decisions on fee forfeiture are unanimous. See *supra* notes 47-52 and accompanying text.

138. Constitutionally requisite procedures for the administration of a statute may be implied to preserve the validity of the statute. See *Callen v. Sherman's, Inc.*, 92 N.J. 114, 134, 455 A.2d 1102, 1112 (1983); *People v. Amor*, 12 Cal. 3d 20, 30, 523 P.2d 1173, 1179, 114 Cal. Rptr. 765, 771 (1974). An implied hearing requirement reconciles the plain language of 18 U.S.C.A. § 1963(c) and 21 U.S.C.A. § 853(c) embracing attorneys' fees, see *supra* notes 33-36 and accompanying text, with Congress' sixth amendment concerns.

An alternative to a hearing and appointment of counsel under the CJA is exemption of a reasonable fee from forfeiture. Though not as drastic as an absolute exemption, a reasonable fee scheme would intrude more deeply than the proposal in this Note into areas where courts should not intrude if possible. Congress, through the CJA, has established the maximum rates, reasonable or not, that the government may pay for appointed counsel. See *supra* note 82. A RICO or CCE exception to the CJA rates would better be left to Congress. Congress has also given courts little latitude to make "reasonable" deductions from the forfeiture penalty. See *supra* note 136 and accompanying text. The government, of course, would be free to negotiate a reasonable fee. The negotiated fee would primarily depend on the strength of the government's case and the government's willingness to disclose its case at a pretrial hearing. The government proposed an exempt fee of \$80 per hour in *United States v. Ianniello*, No. S 85 Cr. 115, slip op. at 16 (S.D.N.Y. Sept. 3, 1985). There should be enough lawyers willing to work at \$80 per hour that the defendant can find capable representation.

139. The only holding dealing squarely with the issue is *United States v. Bello*, 470 F. Supp. 723, 725 (S.D. Cal. 1979), which upheld a preliminary injunction over the objection that the injunction prevented the defendant from retaining counsel of his choice. The court relied on *United States v. Brodson*, 241 F.2d 107, 110-11 (7th Cir.), *cert. denied*, 354 U.S. 911 (1957), in which a preliminary injunction was upheld in a tax evasion case though it denied the defendant the means to hire an accountant. In *United States v. Long*, 654 F.2d 911, 913, 915 (3d Cir. 1981), assets transferred to an attorney were held to be forfeitable, but the decision did not directly address the sixth amendment issue. *United States v. Ianniello*, No. S 85 Cr. 115, slip op. at 14-15 (S.D.N.Y. Sept. 3, 1985), in exempting attorneys' fees from forfeiture, distinguished *Long* on the ground that *Long* was decided on general due process, rather than sixth amendment, grounds. Several cases have suggested in dicta that a preliminary injunction might be modified to allow the defendant to retain counsel. See *United States v. Lewis*, 759 F.2d 1316, 1325-26 (8th Cir.), *cert. denied*, 106 S. Ct. 406 (1985); *United States v. Ray*, 731 F.2d 1361, 1365-66 (9th Cir. 1984); *United States v. Veon*, 538 F. Supp. 237, 247 n.16 (E.D. Cal. 1982).

Prior to the 1984 amendments, the RICO and CCE forfeiture statutes contained no procedural guidelines for the issuance of preliminary injunctions.<sup>140</sup> The cases interpreted the pre-amendment statutes as containing procedural safeguards implied by the fifth amendment due process clause.<sup>141</sup> These pre-amendment decisions recognized that the government may obtain a brief ex parte restraining order, based solely on an indictment, to deny the defendant the opportunity to frustrate the purpose of the forfeiture proceeding by immediately disposing of his property.<sup>142</sup> However, since due process requires an opportunity to be heard "at a meaningful time and in a meaningful manner,"<sup>143</sup> most of these decisions held that a full evidentiary hearing was required before the restrictions on the defendant's assets could continue beyond the period of a temporary restraining order.<sup>144</sup>

In imposing a hearing requirement, the pre-amendment cases modeled their approach on the civil rules governing preliminary injunctions.<sup>145</sup> Adoption of these civil procedures is not surprising, considering the lack of standards regarding pretrial injunctions in the forfeiture statutes' legislative history<sup>146</sup> and the Federal Rules of Criminal Procedure.<sup>147</sup>

The cases also borrowed from the civil rules in determining what must be proved at the hearing. In *United States v. Mandel*,<sup>148</sup> the court stated that the four traditional factors governing the issuance of preliminary injunctions in civil cases should also govern preliminary injunctions under RICO.<sup>149</sup> The questions to be investigated are

- (1) Has the petitioner made a strong showing that he is likely to prevail on the merits at trial? (2) Has irreparable harm in the absence of relief been shown? (3) Would the issuance of the injunction substantially

140. 1984 Senate Report, *supra* note 5, at 195, reprinted in 1984 U.S. Code Cong. & Ad. News at 3378.

141. See *United States v. Lewis*, 759 F.2d 1316, 1324-25 (8th Cir.), *cert. denied*, 106 S. Ct. 406 (1985); *United States v. Ray*, 731 F.2d 1361, 1366 (9th Cir. 1984); *United States v. Spilotro*, 680 F.2d 612, 617 (9th Cir. 1982); *United States v. Long*, 654 F.2d 911, 915 (3d Cir. 1981); *United States v. Veon*, 538 F. Supp. 237, 244-45 (E.D. Cal. 1982).

142. See *United States v. Long*, 654 F.2d 911, 915 (3d Cir. 1981); *United States v. Veon*, 538 F. Supp. 237, 240, 242-43 (E.D. Cal. 1982).

143. *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965); see *United States v. S8850*, 461 U.S. 555, 562 (1983); *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972).

144. *United States v. Lewis*, 759 F.2d 1316, 1325 (8th Cir.), *cert. denied*, 106 S. Ct. 406 (1985); *United States v. Ray*, 731 F.2d 1361, 1366 (9th Cir. 1984); *United States v. Long*, 654 F.2d 911, 915 (3d Cir. 1981). *Contra United States v. Bello*, 470 F. Supp. 723, 724-25 (S.D. Cal. 1979); *United States v. Scalzitti*, 408 F. Supp. 1014, 1014-15 (W.D. Pa. 1975), *appeal dismissed mem.*, 556 F.2d 569 (3d Cir. 1977).

145. See, e.g., *United States v. Lewis*, 759 F.2d 1316, 1325 (8th Cir.) (Fed. R. Civ. P. 65 is incorporated by implication in CCE), *cert. denied*, 106 S. Ct. 406 (1985); *United States v. Crozier*, 674 F.2d 1293, 1297-98 (9th Cir. 1982) (same), *vacated and remanded for rehearing*, 104 S. Ct. 3575 (1984).

146. See *United States v. Mandel*, 408 F. Supp. 679, 681-82 (D. Md. 1976).

147. The Federal Rules of Criminal Procedure are silent on preliminary forfeiture procedures. See *United States v. Veon*, 538 F. Supp. 237, 246 n.12 (E.D. Cal. 1982).

148. 408 F. Supp. 679 (D. Md. 1976).

149. See *id.* at 682 (dictum).

harm other parties interested in the proceedings? and (4) Where does the public interest lie?<sup>150</sup>

In applying this law to RICO and CCE injunctions, the *Mandel* decision and the widely followed decision in *United States v. Long*<sup>151</sup> focused on the first factor, and determined that the government must prove likelihood of defendant's guilt and likelihood of forfeitability of the assets the government seeks to freeze.<sup>152</sup>

By enacting the 1984 amendments, Congress rejected the implication of a mandatory hearing on preliminary injunctions. The new forfeiture statutes permit a preliminary injunction on the strength of an indictment alone.<sup>153</sup> The legislative history specifically indicates that a pretrial evidentiary hearing on the merits need not be held. The Senate report noted that a hearing requirement would make it difficult for a prosecutor to seek a preliminary injunction "because of the potential for damaging premature disclosure of the government's case . . . and for jeopardizing the safety of witnesses and victims in racketeering and narcotics trafficking cases."<sup>154</sup> For similar reasons, the statutes make hearsay admissible at a preliminary injunction hearing.<sup>155</sup>

Now that Congress has articulated particular, compelling reasons for dispensing with the hearing, it will be interesting to see if the courts will be as eager to overturn the new statute as they were to fill the due process gap in the old one. The first Court of Appeals decision dealing with the new preliminary injunction procedures declared them unconstitutional and continued to find a hearing requirement implied.<sup>156</sup>

### B. *Applying the Long Approach to Forfeiture of Attorneys' Fees*

Regardless of whether due process requires a hearing to protect property interests affected by an injunction, a hearing should be required in fee-forfeiture cases,<sup>157</sup> where there is, in addition to an effective restraint

150. *Id.*

151. 654 F.2d 911 (3d Cir. 1981).

152. *See id.* at 915; *Mandel*, 408 F. Supp. at 682-83.

153. 18 U.S.C.A. § 1963(e)(1) (West Supp. 1986); 21 U.S.C.A. § 853 (e)(1) (West Supp. 1986).

154. 1984 Senate Report, *supra* note 5, at 196, *reprinted in* 1984 U.S. Code Cong. & Ad. News at 3379.

155. *See* 18 U.S.C.A. § 1963(e)(3) (West Supp. 1986); 21 U.S.C.A. § 853(e)(3) (West Supp. 1986). Requiring witnesses to testify at a hearing "may jeopardize the safety of witnesses or subject them to pressures which may dissuade them from testifying at trial." 1984 Senate Report, *supra* note 5, at 205, *reprinted in* 1984 U.S. Code Cong. & Ad. News at 3388. For similar reasons, hearsay should be admissible at a fee-forfeiture hearing.

156. *See United States v. Crozier*, 777 F.2d 1376, 1383 (9th Cir. 1985).

157. The objection has been raised that a pretrial determination of title to assets is inconsistent with the presumption of innocence that a defendant enjoys until he is convicted. *See United States v. Mandel*, 408 F. Supp. 679, 682-83 (D. Md. 1976). While superficially appealing, the argument runs counter to well established law. "The presumption of innocence is a doctrine that allocates the burden of proof in criminal trials." *Bell v. Wolfish*, 441 U.S. 520, 533 (1979). It has no application to pretrial restraints on a defendant's liberty or property. *See id.*; *United States v. Spilotro*, 680 F.2d 612, 618 (9th

on property, an impingement on the defendant's sixth amendment rights. An absolute exemption of fees from forfeiture is not warranted.<sup>158</sup> As already noted, the particular sixth amendment right asserted—the right to choice of counsel—is a qualified right that must be balanced against competing interests.<sup>159</sup>

The *Long* hearing can be adapted to the task of balancing the interests at stake in fee forfeiture. While the focus of the *Long* hearing is on property rights,<sup>160</sup> the right to choice of counsel also hinges on property rights. A defendant can exercise a right to counsel of his choice only if he can afford counsel of his choice.<sup>161</sup> In balancing the government's and the defendant's interests, the weight of defendant's right to counsel of choice should depend on how likely it is that the defendant truly can afford private counsel, which depends in turn on whether the defendant will be convicted and the assets forfeited. Likelihood of conviction will be the element varying most from case to case and generally governing in the balancing test.<sup>162</sup> Hence a fee-forfeiture balancing test turns on the inquiry into property rights made in the *Long* hearing.

In terms of the four factors in civil pretrial injunctions, the involvement of sixth amendment rights adds an element of hardship on the defendant<sup>163</sup> not present in cases where the deprivation is only of property. The hardship is the potential adverse effect on the outcome of the trial. However, the added likelihood of losing at trial as a result of the supposed lesser competence of appointed counsel is not great enough to tip automatically the balance of defendant's and government's interests in favor of the defendant.<sup>164</sup> At most, it might raise the standard of proof in the *Long* test.<sup>165</sup> At a minimum, it adds some sixth amendment weight to the due process argument that a hearing is necessary at all.

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Cir. 1982); *United States v. Long*, 654 F.2d 911, 916 n.8 (3d Cir. 1981); *United States v. Scalzitti*, 408 F. Supp. 1014, 1015 (W.D. Pa. 1975), *appeal dismissed mem.*, 556 F.2d 569 (3d Cir. 1977); 1984 Senate Report, *supra* note 5, at 203, 204, *reprinted in* 1984 U.S. Code Cong. & Ad. News at 3386, 3387.

158. See *supra* notes 68-72 and accompanying text.

159. See *supra* notes 68-72 and accompanying text.

160. See *supra* note 152 and accompanying text.

161. *Cf. United States v. Burton*, 584 F.2d 485, 489 (D.C. Cir. 1978) (accused who is "financially able" should not arbitrarily be denied opportunity to retain counsel of his choosing), *cert. denied*, 439 U.S. 1069 (1979).

162. The weight of the government interest in preserving assets, which is also the public interest (factors 2 and 4 of the preliminary injunction standards, see *supra* note 150 and accompanying text), and of the hardship on the defendant (factor 3 of the preliminary injunction test, see *supra* note 150 and accompanying text) will not ordinarily depend upon the particular circumstances of a case.

163. Factor 3 of the preliminary injunction test. See *supra* note 150 and accompanying text.

164. Effect on the outcome is inherent in denial of the qualified right to choice of counsel, but this has not prevented courts from denying counsel of choice. See *supra* notes 68-71.

165. One pre-amendment decision raised this question but left it open. See *United States v. Veon*, 538 F. Supp. 237, 247 n.16 (E.D. Cal. 1982). The court said in dictum that a pretrial injunction could be modified to allow payment of legal fees and did not

### C. *Standard of Proof at the Pretrial Hearing*

Discussion of the standard of proof required at a fee-forfeiture hearing should start with the standards imposed by due process in general. Just as *Long* borrowed the scheme for a hearing from the civil tradition, so too did it borrow a standard of proof. As already noted, in determining what must be proven at the hearing, *Long* focused on the likelihood of government success at trial.<sup>166</sup> The standard of proof followed readily: the "government must demonstrate that it is likely to convince a jury, beyond a reasonable doubt, of two things: one, that the defendant is guilty of violating the [CCE] statute and two, that the profits or properties at issue are subject to forfeiture."<sup>167</sup> The decision does not precisely define what "likely to convince a jury" means; specifically, the decision does not indicate if it means more likely than not (a preponderance standard). In essence, *Long* asks the hearing judge to give odds on conviction and forfeiture, but does not explicitly say what odds justify a preliminary injunction. The *Long* decision has been followed without any comment on the apparent imprecision.<sup>168</sup>

Even assuming for simplicity that "likely to" convict means "more likely than not" to convict, the *Long* standard is murky.<sup>169</sup> *Long* evidently requires more than the civil preponderance standard and less than the reasonable doubt standard applied at the trial of the RICO or CCE charges, but exactly where *Long* falls in between is uncertain.<sup>170</sup> Like its

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reach the issue of whether a higher standard of proof was required where the right to counsel, not merely property interests, is involved. *See id.*

166. *See supra* note 152 and accompanying text.

167. *United States v. Long*, 654 F.2d 911, 915 (3d Cir. 1981).

168. *See, e.g., United States v. Lewis*, 759 F.2d 1316, 1324-25 (8th Cir.), *cert denied*, 106 S. Ct. 406 (1985); *United States v. Spilotro*, 680 F.2d 612, 618 (9th Cir. 1982); *United States v. Crozier*, 674 F.2d 1293, 1297-98 (9th Cir. 1982), *vacated and remanded for rehearing*, 104 S. Ct. 3575 (1984).

169. *See Note, Due Process in Preliminary Proceedings Under RICO and CCE*, 83 Colum. L. Rev. 2068, 2094 (1983).

170. *United States v. Beckham*, 562 F. Supp. 488 (E.D. Mich. 1983), found the *Long* standard, as outlined in *United States v. Spilotro*, 680 F.2d 612, 617-18 (9th Cir. 1982), "difficult to apply with any degree of precision," 562 F. Supp. at 489, and adopted the established standard, "clear and convincing evidence," *id.* at 490. "Not only is a judge incapable of evaluating what is likely to convince a jury, but [the *Long*] standard . . . is extremely cumbersome and likely to taint a later jury trial." *Id.* at 490.

Admittedly, the *Long* standard is not a model of clarity, but it is no less workable than the traditional civil preliminary injunction standard. It is also debatable whether a finding that there is clear and convincing evidence of the defendant's guilt is any less prejudicial than a finding that the jury is likely to convict him.

*United States v. Veon*, 538 F. Supp. 237 (E.D. Cal. 1982), agreed with *Long* about what was to be proved, but adopted a lower standard of proof. *See id.* at 248. In the absence of procedures for criminal pretrial injunctions, *Veon*, rather than analogizing from civil standards, looked to more general due process guidelines announced by the Supreme Court in *Santosky v. Kramer*, 455 U.S. 745, 756 (1982). *See* 538 F. Supp. at 247. The Court in *Santosky*, 455 U.S. at 754, indicated that the standard of proof for a particular kind of case should be determined by the principles the Court had set forth in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). In *Mathews*, a case involving administrative action to deny statutory benefits, three elements were considered in determining

older cousin, the civil preliminary injunction standard, the *Long* standard adds an extra layer of uncertainty to the traditional trial standards of proof.

Further, the *Long* standard seems a heavy burden for the government to meet to tie up temporarily the defendant's assets. In the civil tradition, likelihood of success at trial is only one of four elements to be considered in issuing preliminary injunctions.<sup>171</sup> In establishing a burden of proof, *Long* focused on this element to the exclusion of the other three elements.<sup>172</sup> *Long* correctly emphasized probability of success at trial in determining what is to be proven, because, of the four elements, it is the one that will vary most from case to case.<sup>173</sup> But the other elements' relatively constant weight does not mean that they should be given no weight at all in establishing a standard of proof. In the civil context, one court noted that the "probability of success on the merits" element does not require the moving party to prove a greater than fifty percent likelihood that he will prevail on the merits if the balance of the other three factors strongly favors him.<sup>174</sup>

Accordingly, the traditional civil test has been restated as follows: A preliminary injunction should issue "upon a clear showing of either (1) probable success on the merits *and* possible irreparable injury, *or* (2) sufficiently serious questions going to the merits to make them a fair ground for litigation *and* a balance of hardships tipping decidedly toward the party requesting the preliminary relief."<sup>175</sup> Where a defendant, if not enjoined, may frustrate the purpose of the forfeiture statutes, and the hardship on the defendant is merely the inability to transfer his property,<sup>176</sup> satisfaction of the preponderance standard for guilt should be sufficient to justify a preliminary injunction.

Though the *Long* standard of proof is too strict for cases in which

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whether a challenged government procedure met the requirements of due process: 1) the individual's interest affected by the procedure; 2) the risk of erroneous deprivation created by the procedure; and 3) the countervailing government interest supporting use of the procedure. *See id.*

Applying the *Mathews* test, *Veon* reasoned with respect to elements 1 and 3 that a preponderance standard sufficed where the defendant's right to transfer his property was pitted against the strong government interest in maintaining the court's jurisdiction over the property. *See* 538 F. Supp. at 247-48. As for element 2, the court held that because of the complexity of CCE cases, the risk of erroneous deprivation was high, and hence this element of the *Mathews* test favored a standard higher than a preponderance. *See id.* at 248. Despite the concern over erroneous deprivation, *Veon* settled on a preponderance standard. *See id.*

171. *See supra* note 150 and accompanying text.

172. *See Long*, 654 F.2d at 915-16.

173. *See supra* note 162 and accompanying text.

174. *See Dataphase Sys. v. C L Sys.*, 640 F.2d 109, 112-13 (8th Cir. 1981) (en banc).

175. *Fennell v. Butler*, 570 F.2d 263, 264 (8th Cir.) (quoting *Gresham v. Chambers*, 501 F.2d 687, 691 (2d Cir. 1974)) (emphasis in original), *cert denied*, 437 U.S. 906 (1978); *see William Inglis & Sons Baking Co. v. ITT Continental Baking Co.*, 526 F.2d 86, 88 (9th Cir. 1975).

176. *See the analysis of the Veon court, supra* note 170.

property rights alone are implicated, it is appropriate for the fee-forfeiture hearing, where the right to counsel is also at stake.<sup>177</sup> As already noted, the denial of counsel of choice adds the element of hardship to the defendant<sup>178</sup> to the interests to be balanced. In this case, the balance of hardships does not tip decidedly toward the government and the government should be required to make a more convincing showing that it will ultimately prevail at trial.<sup>179</sup> Hence, the *Long* standard of proof—taking *Long* to require a preponderance of evidence that the defendant will be convicted and forfeit his assets—is appropriate for the fee-forfeiture hearing.

D. *An Assured Fee If the Defendant Loses the Pretrial Hearing*

The pretrial hearing does not completely dispose of the issues raised by fee forfeiture. If a defendant wins, his problems of retaining counsel are over. If a defendant loses, he has no right to defend himself with assets the government claims, but he is still entitled to adequate counsel.<sup>180</sup> After losing the hearing, the defendant is less likely than before to be able to retain counsel. Since the defendant becomes temporarily constructively indigent, he should be entitled to appointed counsel.<sup>181</sup>

Appointed counsel suffers from defects,<sup>182</sup> but it is the best the defendant has the right to after losing the fee-forfeiture hearing.<sup>183</sup> The best appointed counsel would be counsel of defendant's choice.<sup>184</sup> Courts should encourage this by appointing defendant's chosen counsel and giving counsel the opportunity to earn the agreed fee. The attorney to whom fees have been paid could be appointed and compensated at CJA rates<sup>185</sup> for time actually spent. If the defendant is convicted and the agreed fees are forfeitable, the attorney would forfeit the excess of his fee over the CJA fee. If the defendant is acquitted or the fees are found not to be forfeitable, the attorney would keep the full fee paid by the defendant.<sup>186</sup> An attorney who undertakes to represent a defendant under such an arrangement is still subject to the ethical strains—conflict of inter-

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177. See *supra* notes 163-65 and accompanying text.

178. See *supra* notes 163-65 and accompanying text.

179. In terms of the *Mathews* formula, *supra* note 170, the involvement of the right to choice of counsel increases the risk of erroneous deprivation enough to warrant a standard higher than a preponderance. See *supra* note 165 and accompanying text.

180. See *supra* notes 60-61 and accompanying text.

181. See *supra* note 74.

182. See *supra* notes 75-76 and accompanying text.

183. See *supra* notes 68-72 and accompanying text.

184. Counsel of defendant's choice has been appointed in a CCE case. See *United States v. Ray*, 731 F.2d 1361, 1366 (9th Cir. 1984).

185. See *supra* note 82.

186. The possibility of retaining the agreed fee should attract some lawyers who would otherwise decline to work at the CJA rates. This, combined with the pretrial hearing, should prevent Legal Aid from being inundated by RICO and CCE cases. See *supra* note 79 and accompanying text.

est—described previously.<sup>187</sup> The CJA fee reduces this ethical problem by ensuring at least some fee. The potential conflict of interest resulting from fee forfeiture, as already discussed, does not present a substantial practical problem,<sup>188</sup> and presents even less of a problem with the assured CJA fee.

#### CONCLUSION

The plain language of the RICO and CCE in-personam forfeiture statutes and the lack of evidence of a contrary legislative intent indicate that the statutes reach attorneys' fees paid with illicit assets. Applying the statutes to attorneys' fees creates conflicts with the defendant's sixth amendment right to counsel, but the problem is not fatal to the statutes. Modifying the statutes by requiring a pretrial hearing on fee forfeiture provides a constitutionally sufficient safeguard of the defendant's rights. The problem posed by the defendant who loses the pretrial hearing is reduced by assuring his attorney a minimum fee under the CJA.

*Frank McCay*

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187. See *supra* Parts II.B and C.

188. See *supra* notes 117-19.



