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FEE PAYMENTS TO CRIMINAL DEFENSE LAWYERS FROM THIRD PARTIES: REVISITING *UNITED STATES V. HODGE AND ZWEIG*

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INTRODUCTION

Many lawyers have studied the case of *United States v. Hodge and Zweig*[1] in their professional responsibility classes.[2] The case is well known for its analysis of the attorney-client privilege when lawyers are asked to disclose the names of their clients or the fee arrangements they have with their clients.[3] In this article, I will discuss an important implication of the case that has apparently been overlooked by other commentators: in many cases involving the payment of attorneys' fees by third parties, criminal defense lawyers must decline the representation.

This implication arises from the context of *Hodge and Zweig*. In the case, the U.S. Court of Appeals for the Ninth Circuit addressed the confidential status of client identity and fee arrangements when a

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1. 548 F.2d 1347 (9th Cir. 1977).

2. The case is discussed in Geoffrey C. Hazard, Jr., Susan P. Koniak & Roger C. Cramton, The Law and Ethics of Lawyering 256-64 (2d ed. 1994); Deborah L. Rhode & David Luban, Legal Ethics 241 (2d ed. 1995). Other casebooks do not discuss *Hodge and Zweig*. *See, e.g.*, Thomas D. Morgan & Ronald D. Rotunda, Professional Responsibility: Problems and Materials (6th ed. 1995); Nathan M. Crystal, Professional Responsibility: Problems of Practice and the Profession (2d ed. 2000); Stephen Gillers, Regulation of Lawyers: Problems of Law and Ethics (5th ed. 1998).

3. For law review articles citing *Hodge and Zweig*, see Stephen McG. Bundy & Einer Richard Elhauge, *Do Lawyers Improve the Adversary System? A General Theory of Litigation Advice and Its Regulation*, 79 Cal. L. Rev. 315, 409 & n.243 (1991); Steven Goode, *Identity, Fees, and the Attorney-Client Privilege*, 59 Geo. Wash. L. Rev. 307, 323-24 & nn.116 & 118 (1991); Susan P. Koniak, *When Courts Refuse to Frame the Law and Others Frame It to Their Will*, 66 S. Cal. L. Rev. 1075, 1110 n.154 (1993); Breckinridge L. Willcox, *Martin Marietta and the Erosion of the Attorney-Client Privilege and Work-Product Protection*, 49 Md. L. Rev. 917, 939-40 & n.158 (1990).

defendant's attorneys' fees are paid by the defendant's confederate in crime.[4] The court concluded that the attorney-client privilege does not prevent disclosure of a fee payer's name or fee arrangement when a co-conspirator pays attorneys' fees as remuneration for a defendant's participation in a criminal scheme.[5] The court reasoned that when drug kingpins or other crime bosses promise to pay their minions' attorneys' fees in the event the minions are arrested, the payments constitute an element of the criminal conspiracy.[6] The payment of the lawyers furthers the conspiracy by compensating the defendants for their contribution to the drug selling or other illicit enterprise.[7] As such, the payment falls under the crime-fraud exception to the attorney-client privilege: defendants and fee payers cannot use their attorneys to hide information about their crimes or frauds.[8] In short, fee payers' identities and fee arrangements are not confidential when fees are paid by third parties as consideration to defendants for engaging in illegal activity. The crime-fraud exception denies the privilege regardless of whether the lawyers knew that they were being used to facilitate a crime or fraud.[9] Because the loss of privilege is a penalty for the client, the lawyer's innocence does not protect the client from the loss of privilege.

While *Hodge and Zweig* is important for its discussion of the attorney-client privilege, it is probably more important for its other implications. I will argue that the case changes the way defense lawyers may interact with drug dealers, mobsters, or other participants in organized criminal activity when the lawyer's fees are paid, or might be paid, by a person other than the defendant. Specifically, I will argue that ethical norms require criminal defense lawyers to decline the payment and instead refer the potential client to a public defender. By accepting such payments, lawyers would violate their professional obligation not to assist a client's criminal activity. In other words, the real issue is not whether these fee arrangements are protected by the attorney-client privilege, but whether they are permissible in the first place.

I. *UNITED STATES V. HODGE AND ZWEIG*

As background for my argument, I will describe the relevant parts of *Hodge and Zweig*. Richard Hodge and Robert Zweig were

4. *See Hodge and Zweig*, 548 F.2d at 1352-55.

5. *Id.* at 1354-55. The government might also seek disclosure of a client's name when an attorney sends an overdue tax payment to the Internal Revenue Service on behalf of an anonymous person. *See* Baird v. Koerner, 279 F.2d 623, 626-27 (9th Cir. 1960).

6. *Hodge and Zweig*, 548 F.2d at 1354-55.

7. *Id.*

8. *See id.*

9. *See id.* at 1354; Restatement (Third) of the Law Governing Lawyers § 82 cmt. c (2000); Charles W. Wolfram, Modern Legal Ethics 279 (1986).

partners in a law practice in California.[10] They had represented Joseph Sandino and several other persons implicated in an alleged conspiracy to import drugs, referred to by prosecutors as the "Sandino Gang."[11] The case arose when agents of the Internal Revenue Service questioned Hodge and Zweig about their receipt of fees from Sandino for services rendered to him or to other persons.[12] Invoking the attorney-client privilege, Hodge and Zweig declined to reveal the nature of their fee arrangements with Sandino or the names of any other persons on whose behalf they received payments from Sandino.[13] The Ninth Circuit rejected Hodge's and Zweig's invocation of the attorney-client privilege through a three-step analysis.

Ordinarily, as the Ninth Circuit observed, client names and fee arrangements are not considered privileged information.[14] No privilege extends to fee arrangements and client identity because the attorney-client privilege protects client communications, not underlying facts that can be learned by the lawyer's personal observations.[15] Both fee arrangements and a client's identity fall into the class of underlying facts that can be learned by the lawyer's personal observations.[16]

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10. *Hodge and Zweig*, 548 F.2d at 1349.
11. *Id.* at 1350.
12. *Id.*
13. *Id.*
14. *Id.* at 1353; *see also* Wolfram, *supra* note 9, at 259-60 (stating that client names and fee arrangements are not deemed by courts to be privileged).
15. *See Hodge and Zweig*, 548 F.2d at 1353.
16. *See* 1 Geoffrey C. Hazard, Jr. & W. William Hodes, The Law of Lawyering: A Handbook on The Model Rules of Professional Conduct § 1.6:105, at 148.1 to .2 (2d ed. 1990 & Supp. 1998). To be sure, it is not clear why fees and identity do not have a communicative aspect. Presumably, the lawyer learns the client's identity by the client telling it to the lawyer. When a criminal lawyer discloses that someone has retained the lawyer's services, the lawyer effectively discloses a declaration by the client that the client has a criminal problem. As to payment of a fee, the client is making a communication about the size of the fee or the client's ability to pay the fee. *Id.* at 149 (Supp. 1996).

The non-privileged status of names and fees makes sense to the extent that the attorney-client privilege can be explained by "the lawyer's dilemma." *Developments in the Law—Privileged Communications*, 98 Harv. L. Rev. 1450, 1515-16 (1985). According to the lawyer's dilemma, in the absence of a privilege, lawyers would be faced with two unattractive choices. They could either encourage full disclosure and run the risk that they would be required later to incriminate their clients, or they could counsel their client against disclosure and thereby compromise their ability to give good legal advice. *Id.* at 1515. Without assurances of privilege, it is argued, lawyers will refrain from asking their clients many important questions. *See id.* at 1515-16. Under the lawyer's dilemma theory, the only things privileged are what the lawyer can choose not to learn from the client. Fees and client identity do not qualify under that definition. Of course, to the extent that the attorney-client privilege is justified by "the client's dilemma," there should be a privilege for client identity and fees. The client's dilemma is that, without assurances of confidentiality and privilege, people would be faced with a choice between obtaining counsel and foregoing their right against self-incrimination or preserving their right against self-incrimination and foregoing their right to counsel. *Id.* at 1517. Without an attorney-client privilege,

However, there is an important exception to this general rule. If divulging a client's name or a fee arrangement would implicate a client "in the very criminal activity for which legal advice was sought," the information is protected by the attorney-client privilege.[17] In this case, if Hodge and Zweig disclosed the names of people whose legal fees were paid by Sandino, it would suggest that those people were participants with Sandino in his alleged drug dealing. According to this exception, then, the names of Hodge and Zweig's clients were seemingly privileged information.[18]

Nevertheless, in the third step of its analysis, the Ninth Circuit required Hodge and Zweig to disclose the names of clients whose fees were paid by Sandino, and it did so by citing the crime-fraud exception to the attorney-client privilege. Clients may not shelter their illegality in the attorney-client privilege. Therefore, the privilege does not apply when legal representation is used to further a crime or fraud.[19] The Ninth Circuit invoked the crime-fraud exception after finding that Sandino's alleged payments for the legal representation of his co-conspirators were "an integral part" of the drug dealing conspiracy.[20] Sandino secured the participation of his co-conspirators in part by promising them that he would pay their legal expenses if they were ever arrested.[21] When he actually paid their legal fees, he

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potential clients will be dissuaded from seeking legal counsel. *Id.* at 1517. This logic applies to both names and fees. If people are not assured that their fees and identity will be privileged, they may not retain counsel at all. Despite this logic, fees and identity are generally not privileged, and this probably reflects the view that a privilege for such information would become a shield for criminals. As the Second Circuit put it, "a broad privilege against the disclosure of the identity of clients and of fee information might easily become an immunity for corrupt or criminal acts." *In re* Shargel, 742 F.2d 61, 64 (2d Cir. 1984).

17. *Hodge and Zweig*, 548 F.2d at 1353 (citing Baird v. Koerner, 279 F.2d 623, 630 (9th Cir. 1960)). Later cases from the Ninth Circuit have criticized the *Hodge and Zweig* court's characterization of the circumstances that make client identities and fee arrangements privileged information. *See, e.g.*, Tornay v. United States, 840 F.2d 1424, 1427-28 (9th Cir. 1988) (viewing the *Hodge and Zweig* use of *Baird* as having no precedential value); *In re* Grand Jury Subpoenas, 803 F.2d 493, 496-97 (9th Cir. 1986) (stating that the *Hodge and Zweig* opinion "misstated the principle of *Baird*"); *In re* Osterhoudt, 722 F.2d 591, 593 (9th Cir. 1983) (viewing the *Hodge and Zweig* opinion as "a misstatement of the *Baird* rule"). However, this disagreement is not germane to the part of *Hodge and Zweig* that interests me, the court's discussion of the crime-fraud exception to privilege. Moreover, the *Hodge and Zweig* court's characterization is still accepted by some courts and other authorities. *See, e.g.*, Developments in the Law, *supra* note 16, at 1519-20 (discussing three formulations of the principle that client identity and fee arrangement information are sometimes protected by the attorney-client privilege).

18. *Hodge and Zweig*, 548 F.2d at 1354. Some of the clients' names were not protected by the privilege because they had already pled guilty to the crimes to which the information might link them. *Id.* at 1353-54.

19. *Id.* at 1354.

20. *Id.*

21. In the case, the existence of the promise to pay legal fees was established because it was alleged in the indictment, and some of the conspirators had pled guilty

was taking action to facilitate the group's illegal activities. Accordingly, the co-conspirators' identities were not privileged.[22]

II. IMPLICATIONS OF *HODGE AND ZWEIG* FOR THIRD PARTY FEE PAYMENTS: THE ETHICAL OBLIGATION TO DECLINE LEGAL REPRESENTATION

Hodge and Zweig serves as a useful case to illustrate both the application of the attorney-client privilege to client identity and fee arrangements and the effect of the crime-fraud exception on the privilege.[23] However, when one considers the significance of *Hodge and Zweig* for future lawyer-client interactions, it becomes clear that the case has more profound implications for criminal defense lawyers.

Suppose that a person has been arrested for drug dealing or other organized criminal activity and calls an attorney to provide representation. After some discussion of the specifics, the attorney indicates a willingness to take on the case and describes the firm's fee structure. Assume further that the potential client agrees to the fee arrangement and then informs the lawyer that another person will be paying the bills.

Alternatively, suppose a slightly different, and perhaps more common, scenario. In the second scenario, an individual meets with an attorney to secure legal representation for other persons. The individual describes drug dealing or other criminal charges against the defendants and indicates that she will be paying the defendants' legal bills.[24]

With either scenario, *Hodge and Zweig* becomes relevant. The potential payer of the legal fees might be a family member or friend, but after *Hodge and Zweig* (and other third-party payment cases[25]),

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to the charges. *Id.* at 1350 & n.2, 1354.

22. From the court's logic, it would seem to follow that the attorney-client privilege was lost entirely for Hodge and Zweig's representation of Sandino's collaborators. If securing the attorneys' services constituted a part of the criminal conspiracy, then any discussions between the clients and Hodge and Zweig should fall under the crime-fraud exception.

However, while the court did not address this point explicitly, it suggested that its holding extended only to information regarding client identity and fee arrangements. In defending its decision, the court observed that the privilege was being lost for information that ordinarily did not receive protection under the attorney-client privilege. *Id.* at 1355. Accordingly, the court declared, "the intrusive effect of our ruling in this case is minimal." *Id.*

23. *See, e.g.*, Geoffrey C. Hazard, Jr., Susan P. Koniak & Roger C. Cramton, Teacher's Manual to The Law and Ethics of Lawyering 72 (2d ed. 1994) (discussing *Hodge and Zweig*).

24. *See, e.g.*, Goode, *supra* note 3, at 323-24 (observing that third party benefactors are often kingpins in drug conspiracies); James A. Brown, Note, *Hiring of Attorney to Represent Third Parties — The Umbrella Defense*, 43 La. L. Rev. 1041, 1041 (1983) (discussing the hiring of an attorney by a central figure in a criminal conspiracy to supply bond money and representation for "apprehended mules").

25. *See, e.g., In re* Pavlick, 680 F.2d 1026, 1028 (5th Cir. 1982) (en banc) (plurality

the lawyer must wonder whether the payments will be coming from the defendant's crime boss or other collaborator in crime. And, in many cases, the lawyer will know, or will have good reason to suspect, that the payer of fees is the defendant's superior in the criminal chain of command and that the fees are fulfilling a promise by the superior to pay legal bills in the event of arrest.

If that is the case, the lawyer should conclude two important things from the holding in *Hodge and Zweig*: (1) there will be no attorney-client privilege for the fee arrangement,[26] and (2) the lawyer will be furthering a criminal conspiracy by providing representation. For the fee payer and defendant, it might be inadvisable to retain a lawyer with whom there will be a qualified attorney-client privilege. More importantly, for the lawyer, it would be unacceptable to engage in representation that would facilitate a criminal conspiracy. Model Rule of Professional Conduct 1.2(d) forbids attorneys from assisting a client in criminal or fraudulent conduct.[27] In many third party payment cases, then, the lawyer would have to reject the arrangement. The lawyer would have to decline representation and refer the potential client to a public defender.

Now, a number of questions come to mind. In some cases it might be obvious that the payer of fees is a superior or other collaborator in crime, but it will often not be clear. When should the lawyer assume that the payer of fees is a confederate in crime rather than a family member or friend? Or suppose that it is clear that the defendant and the fee payer are co-conspirators, and the lawyer declines representation. What happens when lawyers disclose the reason for declining representation, and defendants state that they will pay the bills from their own assets or will turn to family members for assistance? Can lawyers trust that response? If lawyers must ascertain the nature of third-party payments and decline fees paid by collaborators, other concerns arise. Would intrusive inquiries by lawyers unduly compromise client trust? Would criminal defendants receive inadequate representation by having to turn to court-appointed counsel? Finally, assume a different variation on the facts of *Hodge and Zweig*. The defendant is a corporate officer charged with an environmental crime, and the company will pay the fees in accordance with its contract of employment with the officer. Would the obligation to decline third party payments of fees still apply?

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opinion) (following *Hodge and Zweig*).

26. *See In re* Grand Jury Subpoena Served Upon Doe, 781 F.2d 238, 248 (2d Cir. 1985).

27. The Rule states that "[a] lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent." Model Rules of Prof'l Conduct R. 1.2(d) (1983) [hereinafter, Model Rules]; *see also* Model Code of Prof'l Responsibility DR 7-102(A)(7) (1981) [hereinafter, Model Code] ("In his representation of a client, a lawyer shall not . . . [c]ounsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent.").

These are all important questions, and to their answers I will now turn.

A. *Third Party Fee Payments Give Rise to a Duty of Lawyer Inquiry*

In some cases, it will be obvious, either from client disclosure or from other facts, that the fee payer is compensating the defendant for collaborating in crime. In other cases, however, the lawyer will only have strong suspicions about the fees.[28] Attorneys could ask about the payments, but they may not be confident about the trustworthiness of the response, particularly if defendants and fee payers know that they will be turned away if they substantiate the lawyer's suspicions.[29]

One might argue that lawyers have no duty to confirm or refute their suspicions. Model Rule 1.2(d) prohibits lawyers from assisting a client in crime or fraud, but 1.2(d) applies only when the lawyer "knows" that the representation would assist in the commission of crime or fraud.[30] Accordingly, it might follow that unless a lawyer is certain that the fee payment constitutes compensation for the defendant's collaboration in crime, the lawyer need not decline representation on account of suspicions about a third party fee payer.

Although this is a plausible reading of Model Rule 1.2(d), it is not an acceptable reading. In its definitional section, the Model Rules state "[a] person's knowledge may be inferred from circumstances."[31] Furthermore, courts and other interpreters of the Rules have made it clear that lawyers must not ignore signals that their representation might be used to perpetrate a crime or fraud. The Second and Sixth Circuits have observed that lawyers must not "shut their eyes to what was plainly to be seen"[32] nor "turn a blind eye to the obvious."[33]

An informal ethics opinion from the American Bar Association provides similar guidance. The opinion specifically addresses situations in which lawyers suspect that their representation might assist a client's perpetration of crime or fraud. According to Informal Opinion 1470, lawyers cannot disregard their suspicions, but must assure themselves that they would not be assisting criminal conduct before taking the case: "A lawyer cannot escape responsibility by

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28. It is not clear what Hodge and Zweig knew or suspected about their fee arrangements when they were retained. We do know from the court's opinion that the defendants had acknowledged their third party fee arrangement in their plea bargain. United States v. Hodge and Zweig, 548 F.2d 1347, 1350 & n.2 (9th Cir. 1977).

29. Note that there are two parts to this issue: whether the fee payer is a co-conspirator in crime and whether the payments fulfill an earlier promise to do so. The attorney would not become an assister in the criminal conspiracy if the offer to pay legal fees came after the defendant was arrested. This point is discussed *infra*, at text accompanying notes 47-50.

30. *See supra* note 27.

31. Model Rules, *supra* note 27, Terminology ¶ 5.

32. United States v. Benjamin, 328 F.2d 854, 863 (2d Cir. 1964).

33. United States v. Wuliger, 981 F.2d 1497, 1505 (6th Cir. 1992).

avoiding inquiry. A lawyer must be satisfied, on the facts before him and readily available to him, that he can perform the requested services without abetting fraudulent or criminal conduct.... Otherwise, the lawyer has a duty of further inquiry."[34] In other words, once the facts suggest that representation might entail assisting a client's criminal activities, lawyers bear the burden of resolving their doubts. A lawyer must conduct further inquiry to determine whether or not the client will be misusing the legal guidance.[35] Thus, Geoffrey Hazard and William Hodes warn that "a lawyer who has disregarded warning signals about the illegality of a client's course of conduct... runs the serious risk that in later criminal, civil or disciplinary proceedings he will be found to have 'known' anyway."[36] In short, when offered payment by a third party, criminal defense lawyers cannot ignore the possibility that the third party is compensating the defendant for collaboration in crime. Model Rule 1.2(d)'s prohibition of a lawyer's assistance in a client's crime or fraud may give rise to a duty of inquiry.

My discussion so far has focused on general considerations about the need for lawyers to follow up on their suspicions about third party payments. Let us now turn to some more specific matters. When, for example, should a lawyer's suspicions trigger an inquiry? What factors should make lawyers worry that their fees represent compensation to the defendant for participating in a criminal

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34. ABA Comm. on Ethics and Prof'l Responsibility, Informal Op. 1470 (1981).

35. *See* 1 Hazard & Hodes, *supra* note 16, § 1.6:403, at 199-200 (2d ed. 1990); John P. Freeman & Nathan M. Crystal, *Scienter in Professional Liability Cases*, 42 S.C. L. Rev. 783, 839-44 (1991) (discussing conscious avoidance).

36. 1 Hazard & Hodes, *supra* note 16, § 1.2:502, at 48.1 (Supp. 1993); *see also In re* Abrams, 266 A.2d 275, 277 (N.J. 1970) (observing that courts can assume knowledge when a lawyer is regularly paid by known crime bosses to represent defendants whom they have not met before being retained); Eugene R. Gaetke & Sarah N. Welling, *Money Laundering and Lawyers*, 43 Syracuse L. Rev. 1165, 1187-89 (1992) (noting that deliberate or willful ignorance in the face of suspicious circumstances can establish liability even when knowledge is required). In some cases, the duty of competent representation and its subsidiary duty of adequate investigation, set forth in Model Rule 1.1 and comment 5, will require the lawyer to inquire into the nature of the fee arrangement. *Id.* at 1181 & nn. 79-80.

If lawyers would violate ethical prohibitions against assisting criminal activity by accepting third party fees, the question arises whether they would also be violating *criminal* prohibitions against assisting criminal activity. Would accepting attorneys' fees from a collaborator in crime constitute aiding and abetting the criminal conspiracy? Answering this question fully would go beyond the scope of this article. However, a few points can be made. In some cases, it would be appropriate to prosecute a lawyer for accepting fees from a crime boss to represent members of a crime ring. A lawyer may knowingly play an integral role in promoting the criminal conspiracy. *See* Bruce Green, *The Criminal Regulation of Lawyers*, 67 Fordham L. Rev. 327, 355-60 (1998) (discussing accessorial liability under the criminal law for defense lawyers). On the other hand, because ethical obligations are ordinarily more stringent than legal obligations, *see infra*, text accompanying notes 41-43, we should have a higher threshold for finding a criminal violation than a violation of professional ethics when lawyers accept fees from third parties.

conspiracy? The *Hodge and Zweig* court does not give us much guidance because, in that case, the defendants had pled guilty to the charge that their legal expenses were being paid as compensation for collaborating in the drug-selling ring.[37]

B. *Third Party Payments in the Context of Organized Criminal Activity Should Generally Trigger an Inquiry About the Payments*

In many cases, the very existence of a third party source of fees may arouse a lawyer's suspicions. If the defendant faces charges of drug distribution or other crimes that commonly involve criminal conspiracies, especially if co-defendants also face those charges, lawyers should be alert to the implications of *Hodge and Zweig*.[38] When a third party pays legal fees, a likely reason for the payment is that the defendant and the fee payer are collaborators in crime. Even if criminal collaboration is not the most common reason for third party payments, it is common enough that it should prompt further inquiry.

The fact that the fee payer is a relative does not eliminate the *Hodge and Zweig* problem. Frequently, it is literally, not just figuratively, correct to describe co-conspirators as constituting a crime family.[39] More importantly, crime bosses may try to avoid detection by giving the payment to a member of the defendant's family for payment to the lawyer. Thus, even if the fee payer is a parent, spouse, sibling or other relative, lawyers cannot assume that the payment is acceptable. Rather, they would still need assurances that the family member has no ties to the crime ring.

In sum, if we have a third party payer for a defendant whose charges are of the kind typically part of a crime ring, we should adopt a presumption that the lawyer would advance the conspiracy by accepting payment. The burden would then be on the lawyer to rebut the presumption before accepting the case. The presumption could be rebutted by evidence that the fee payer was a family member (or other person) with no apparent connection to the crime ring.[40] The presumption could also be rebutted by evidence that the defendant

37. *See* United States v. Hodge and Zweig, 548 F.2d 1347, 1350 & n.2, 1354 (9th Cir. 1977).

38. *See* United States v. Castellano, 610 F. Supp. 1151, 1160 (S.D.N.Y. 1985) (citing *In re* Shargel, 742 F.2d 61, 64 (2d Cir. 1984) for the point that "payment of another person's legal fees may imply facts about a prior or present relationship with that person").

39. *See, e.g.*, United States v. Aiello, 814 F.2d 109, 110 (2d Cir. 1987) (involving a criminal conspiracy that included a man and two of his sons-in-law).

40. While payment by a family member may avoid the *Hodge and Zweig* problem, the lawyer still has to ensure that the relationship with the family member does not interfere with the representation of the defendant. Nancy J. Moore, *Ethical Issues In Third-Party Payment: Beyond The Insurance Defense Paradigm*, 16 Rev. Litig. 585, 610-18 (1997).

was falsely accused of participating in the crime ring. Or, the presumption could be rebutted by evidence that the payment was not tied to the defendant's participation in the conspiracy.

This leads to an important question: When can the lawyer rely on evidence that the defendant is innocent, that the fee payer has no connection to the crime ring, or that the fee payment is otherwise not tied to the conspiracy to rebut suspicions that accepting third party payment would promote a criminal conspiracy? The next three sections respond to this question.

1. "More Likely Than Not": The Possibility of Client Innocence Does Not Permit Third Party Payments if the Preponderance of Evidence Suggests Client Guilt

As a starting point, we can say that lawyers could not rebut their suspicions about third party payments simply by concluding that there was reasonable doubt about their clients' guilt. The standard for the jury in deciding guilt or innocence is not the appropriate measure for a lawyer's ethical and legal obligations. Given the serious consequences of criminal conviction, we impose an evidentiary standard for deciding guilt that is higher than required for finding violations of civil law or codes of ethics. Moreover, the professional privilege of self-regulation[41] requires physicians, lawyers and other specialists to abide by elevated ethical and legal standards. A lawyer's professional responsibilities are more stringent than a person's obligations under civil law,[42] which in turn are more stringent than a person's duties under the criminal law.[43] Accordingly, with regard to a lawyer's duty not to assist a client's criminal activity, society should impose a lower threshold for finding breaches of that duty than for convicting the clients.

Indeed, in analogous situations, the appropriate evidentiary standard falls somewhere between a probable cause standard and a preponderance of the evidence standard. For example, in deciding whether the attorney-client privilege is vitiated because the lawyer's representation assisted a crime or fraud (the crime-fraud exception), courts generally apply a "prima facie" standard, akin to the standard to defeat a motion for a directed verdict or to establish probable cause

41. *See* Eliot Freidson, Professionalism Reborn: Theory, Prophecy, and Policy 62-64 (1994).

42. Lawyers have a duty of confidentiality, for example, that lay persons do not have. *See* Model Rules, *supra* note 27, R. 1.6.

43. Simple negligence, for example, is commonly grounds for liability under tort law but rarely under criminal statutes. 1 Wayne R. LaFave & Austin W. Scott, Jr., Substantive Criminal Law: Criminal Practice Series § 3.7, at 326-29 (1986).

For more discussion of the different standards in ethics and law, see David Orentlicher, *Representing Defendants on Charges of Economic Crime: Unethical When Done for a Fee*, 48 Emory L.J. 1339, 1346-48 (1999).

in filing criminal charges.[44] In order to pierce the attorney-client privilege, the prosecutor need only show probable cause that the lawyer was assisting the defendant in perpetrating a crime or fraud. Some states require a less demanding standard, while others require a more demanding standard, but the most demanding standard is that the assistance in crime or fraud be shown by a preponderance of the evidence.[45] Similarly, on the question whether someone can be convicted of assisting in crime by receiving stolen property, the Model Penal Code and most modern state codes hold the defendant liable if it was more likely than not that the defendant believed the property was stolen.[46]

In sum, if a lawyer has good reason to think that the defendant is guilty, or at least if the lawyer thinks it more likely than not that the defendant is guilty, the lawyer should decline the payment. The lawyer cannot cite reasonable doubts about the defendant's guilt to justify accepting a payment from the defendant's apparent collaborator in crime.

2. Whether Fee Payments Constitute Compensation to the Defendant is Closely Tied to the Question Whether They Come from a Co-Conspirator

There is another important part of the analysis. To implicate Model Rule 1.2(d)'s prohibition against assisting a client in crime or fraud, fee payers would not only have to be co-conspirators with defendants, they would also have to be paying legal expenses as part of the defendants' compensation. If the offer to pay legal expenses occurred only after a defendant's arrest, then it would not have served as consideration for the defendant's decision to collaborate in crime.

One can easily imagine scenarios in which the payment of legal expenses did not carry out an earlier promise to do so. Crime bosses would still have an incentive to pay fees at the time of arrest even without a prior commitment. By securing the minion's legal representation, the crime boss can influence the nature of the representation. In particular, the crime boss can reduce the likelihood that the minion will agree to a plea bargain that includes providing

44. *See* Restatement (Third) of the Law Governing Lawyers § 82 reporter's note cmt. f (2000); Wolfram, *supra* note 9, at 281-82.

45. *See* Restatement (Third) of the Law Governing Lawyers § 82 reporter's note cmt. f (2000) (citing Caldwell v. Dist. Court, 644 P.2d 26, 33 (Colo. 1982) for relaxed standard (proponent of crime-fraud exception must show some foundation in fact) and State v. Taylor, 502 So. 2d 537, 541-42 (La. 1987) for a stricter standard (proponent of crime-fraud exception must satisfy preponderance of evidence standard)).

46. *See* Orentlicher, *supra* note 43, at 1345-46. Because this preponderance of the evidence standard applies in the setting of a criminal law, the standard under rules of professional responsibility for refusing third party fee payments should be no higher.

incriminating testimony against the crime boss.[47] Apparently, then, we need not assume that promises to pay legal fees are made in advance. Rather, ringleaders might offer to pay the fees once an arrest is made.

However, this possible scenario may not reflect reality, and, even if it does, Rule 1.2(d) would preclude an attorney's acceptance of the payments. First, an absence of promises to pay seems unlikely. Whatever the reasons for paying legal fees, the crime boss would want to make the commitment in advance. Such a commitment will represent value to co-conspirators and give them more of an incentive to participate in the conspiracy.[48] Accordingly, ringleaders would want to take advantage of that incentive when they hire their minions. Why squander the economic value of a promise to pay? If the promise were not made, the ringleader would have to pay a higher salary to the minions to secure their participation.

But, let us assume no advance commitments are in fact made. The application of Rule 1.2(d), compelling the attorney to decline representation, still would not change. Under this assumption, ringleaders would be paying the legal fees for their minions, but they would not offer to do so until after an arrest is made. Initially, a minion might be surprised by the offer and see it as a windfall. Over time, however, it would become part of the practice of the trade. Minions would learn from their own experience, or that of their compatriots, that legal expenses would be paid in the event of an arrest. Under standard principles of contract law and labor law, payment of legal fees would become an implied term or usage of trade of the employment relationship between the crime boss and the minion.[49] As long as payment of legal fees was a standard practice of similar crime rings or of the particular crime boss, it would be as if the minion had been promised that legal fees would be paid in the event of arrest.[50]

I am not suggesting that the minion could enforce the crime boss' obligation to pay legal fees. Rather, my point is that attorneys should assume that the minion expects payment of legal expenses as part of the compensation package for participating in the criminal conspiracy.

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47. *See* Alan M. Dershowitz, The Best Defense 398-99 (1982); Pamela S. Karlan, *Discrete and Relational Criminal Representation: The Changing Vision of the Right to Counsel*, 105 Harv. L. Rev. 670, 690-91 (1992).

48. *See* Karlan, *supra* note 47, at 691.

49. *See* Restatement (Second) of the Law of Contracts §§ 220-222 (1981); Mark A. Rothstein, Charles B. Craver, Elinor P. Schroeder, Elaine W. Shoben & Lea S. VanderVelde, Employment Law § 9.5, at 254 (1994).

50. *See In re* Pavlick, 680 F.2d 1026, 1029 (5th Cir. 1982) (plurality opinion) (observing that an agreement to pay legal fees for co-conspirators "need not be express, and might in a proper case be found to arise even from a custom or a prior course of conduct toward other apprehendees").

When the legal fees are paid, they become part of the criminal conspiracy.

Finally, even if the payments do not fulfill an explicit or implicit commitment to minions for their participation in the crime ring, Model Rule 1.2(d) indicates that attorneys should decline the funds. In this view, the crime boss would be making the payment, not as compensation, but to discourage minions from turning state's evidence and giving testimony against their superiors in the criminal conspiracy. But, if the crime boss were using a financial incentive to buy the minions' silence, then the payment would be designed to obstruct justice.[51] And, the Model Rule 1.2(d) ban on assisting a client's criminal activity includes participation in a client's effort to obstruct justice.[52]

In sum, if a collaborator in crime pays a defendant's attorneys' fees, Model Rule 1.2(d) will probably apply, and it would be unethical for a lawyer to represent the defendant despite the possibility that the payment is not tied to the defendant's participation in the conspiracy. Most likely, payment will represent part of the defendant's compensation from the crime boss, or it will represent an effort to discourage testimony by the defendant against the conspiracy. In deciding whether Rule 1.2(d) applies, lawyers would apply the same standard as they would in deciding whether doubts about the client's guilt would take Rule 1.2(d) out of the picture. The lawyer would have to decline the payment if the lawyer had good reason to suspect a link between the payment and the defendant's participation, or if the lawyer thought the link was more likely than not.

3. Lawyers Must Analyze Third Party Payments from Family Members on a Case-by-Case Basis

Third party payments from family members pose the greatest difficulty since they are, on their face, permissible. Unless the family member appears to be a confederate in crime, the payment would ostensibly be motivated by familial concern rather than an effort to promote a criminal conspiracy. I say ostensibly because we can assume that, if third party payments are turned down as I suggest, crime bosses might try to pay lawyers for their minions indirectly by giving funds to members of the minions' families.

Because the possibility of evasion is real, lawyers will need to ask defendants or family members[53] about the source of payments even when family members are the payers. And, as I suggested earlier, a

51. *See* 18 U.S.C. § 1512(b)(2)(A) (1994); United States v. Cortese, 568 F. Supp. 114, 128 (M.D. Pa. 1983).

52. *See* Model Rules, *supra* note 27, R. 1.2 (d).

53. If the family member retains the lawyer, the questions would be asked of the family member.

simple inquiry would not be sufficient.[54] The defendant or family member might lie in response to the lawyer's questions. Because the response might not be reliable, accepting it at face value would not be sufficient.[55] The lawyer must confirm that the payment was indeed going to come from a family member rather than from a collaborator in crime. In other words, because of the likelihood of deception, the lawyer would assume the burden of confirming the client's or family member's explanation.

In meeting their burden, lawyers would employ the same evidentiary standard as with their other questions. Is there good reason to believe, or is it more likely than not, that the payment from the family member is tied to the criminal conspiracy? And, the payment might be tied either because the family member is involved in the conspiracy or because the ringleader is funneling the defendant's payment through an otherwise uninvolved family member.

C. *Competing Concerns About the Legal Needs of Clients Do Not Justify a Lawyer's Acceptance of Third Party Payment of Legal Fees*

Although concerns about fostering crime point to limits on third party payments, competing ethical considerations suggest that such limits might be inappropriate. Limits on third party payments could threaten the quality of legal representation for criminal defendants. A strong duty of inquiry might jeopardize defendants' trust in the lawyer-client relationship, and a duty to decline representation could force too many defendants to rely on court-appointed counsel. In this section, I will respond to these considerations.

1. Limits on Third Party Payments Would Not Compromise the Ability of Criminal Defendants to Trust Their Lawyers

We might be worried about requiring lawyers to be too inquisitive about third party payments.[56] The attorney-client relationship depends in large part on the ability of clients to trust in their lawyers' loyalty,[57] and ethical codes promote that trust with a number of strong

54. *See supra* notes 28-40 and accompanying text.

55. *See* Gaetke & Welling, *supra* note 36, at 1183; *see also* People v. Zelinger, 504 P.2d 668, 669 (Colo. 1972) (disciplining lawyer for receiving a stolen car as payment for legal fees and accepting the client's denial that the car was stolen without further inquiry).

56. *See* 1 Hazard & Hodes, *supra* note 16, § 1.6:403, at 199-200 (2d ed. 1990).

57. Polk County v. Dodson, 454 U.S. 312, 324 n.17 (1981) (observing that the "adversary system functions best when a lawyer enjoys the wholehearted confidence of his client"); Morgan Cloud, *Forfeiting Defense Attorneys' Fees: Applying an Institutional Role Theory to Define Individual Constitutional Rights*, 1987 Wis. L. Rev. 1, 13-14; Bruce J. Winick, *Forfeiture of Attorneys' Fees Under RICO and CCE and the*

duties, including obligations for lawyers to advocate zealously[58] and to safeguard client confidentiality.[59] It would be hard for lawyers to devote themselves to their clients' causes if they approach their clients with a substantial degree of skepticism. Intrusive inquiries may also undermine a client's confidence; it is difficult to trust a person who exhibits great skepticism about one's status or statements. If trust is compromised, a client might withhold important information from the lawyer, hampering the lawyer's ability to provide the highest quality legal representation.[60] Accordingly, it is often important for an attorney to give a client the benefit of the doubt.[61]

While ethical and legal rules must be careful not to put too great a burden on lawyers to investigate their clients' bona fides, that concern is less compelling in the context of fee payments by possible confederates in crime than it is in other contexts. Even with relatively strict rules on accepting third party fee payments, the ability of criminal defendants to trust their lawyers will not be threatened in the way it might be threatened by strict rules for other issues.

In many third party payment cases, trust will not be jeopardized because lawyers will not have to direct their inquiries at defendants to confirm or refute their suspicions. Recall that third party payment cases can arise when the fee payer retains a lawyer on behalf of the defendant.[62] In such cases, attorneys may be able to determine whether the payments would represent compensation for collaboration in crime through discussion with the fee payer rather than with the defendant. The discussion might undermine the fee payer's trust in the lawyer, but the important trust in the relationship is that between the lawyer and the defendant.

Right to Counsel of Choice: The Constitutional Dilemma and How to Avoid It, 43 U. Miami L. Rev. 765, 802-03 (1989).

58. Model Code, *supra* note 27, EC 7-19 (describing the duty of the lawyer "to represent his client zealously within the bounds of the law"); *see* Monroe H. Freedman, Understanding Lawyers' Ethics 65 (1990); Cloud, *supra* note 57, at 14.

59. Geoffrey C. Hazard, Jr., Ethics in the Practice of Law 21-22 (1978) [hereinafter, Hazard, Ethics]; Model Rules, *supra* note 27, R. 1.6 (Confidentiality of Information).

The duty of loyalty also includes an obligation to avoid conflicts of interest. *See, e.g.*, Hazard, Ethics, *supra*, at 33-38; Model Rules, *supra* note 27, R. 1.7 (Conflict of Interest: General Rule), R. 1.8 (Conflict of Interest: Prohibited Transactions), R. 1.9 (Conflict of Interest: Former Client). This obligation gives support for a duty to decline third party fee payments from the defendant's collaborator in crime. *See infra* text accompanying notes 70-95.

60. *See* Freedman, *supra* note 58, at 88-90. In some settings, erosion of client trust will discourage people from seeking legal counsel early when there might still be time to prevent legal violations. *Cf.* Model Code, *supra* note 27, EC 4-1 (observing that the protection of client confidentiality "encourages laymen to seek early legal assistance").

61. *See* United States v. Wuliger, 981 F.2d 1497, 1505 (6th Cir. 1992).

62. *See supra* text accompanying note 24.

In the cases in which lawyers would have to ask defendants about third party payments, the risk to client trust would still be less than if intrusive inquiries were made about other matters. Ordinarily, if one attorney cannot give a client the benefit of the doubt, no lawyer could. If one lawyer could not approve a stock prospectus because the prospectus might be fraudulent, for example, other lawyers also could not approve the prospectus. Similarly, if one lawyer could not advise a client about the line between permissible and impermissible discharge of toxic wastes into the air because the client might misuse the advice, no lawyer could so advise.[63] Either any lawyer could resolve the doubts in the client's favor or no lawyer could. Accordingly, we ordinarily have to be confident that the rules we impose on one attorney-client relationship apply generally to all attorney-client relationships. Otherwise, we risk having our rules compromise the quality of legal representation for clients in need of legal advice.

With third party fee payments, on the other hand, the risks to client trust are much smaller with a rule that errs on the side of avoiding lawyer assistance in client crime. This is because the issue disappears if the potential client receives representation from a public defender. It is the payment from the third party that implicates Model Rule 1.2(d)'s prohibition on assisting a client's criminal activities. If the client is represented without a fee, Model Rule 1.2(d) drops out of the picture. Accordingly, we do not need a rule of professional responsibility that can be fully generalized. If we err on the side of impeding lawyer assistance in crime, we do not bind all attorney-client relationships that the client might enter.

In other words, a relatively strict interpretation of Rule 1.2(d) is acceptable in the context of third party payments because it can protect against lawyer participation in client crime or fraud and still leave all defendants with the option of an attorney (a public defender) whose representation is unaffected by fee payment concerns. No matter how intrusive fee-charging attorneys would become about the nature and source of the fee payments and no matter how reluctant the attorneys would be to represent defendants in criminal cases, a defendant would always be able to retain a lawyer who did not have to compromise client trust or client access to representation because of questionable payments.

Still, people may worry that limits on third party fees will interfere too much with the quality of legal representation for criminal defendants. Too many defendants might be forced to rely on court-appointed counsel, either because private lawyers' intrusive inquiries

63. *Cf.* Model Rules, *supra* note 27, R. 1.2(d) (stating that lawyers may "discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law").

undermine client trust or because private attorneys decline the representation.

2. Limits on Third-Party Payments Will Not Compromise the Quality of Representation by Forcing Criminal Defendants to Rely on Court-Appointed Counsel

The right to counsel is of fundamental importance, both to protect the interests of defendants and to preserve the integrity of the legal system,[64] but many defendants are unable to afford private lawyers without financial assistance.[65] If those defendants are deprived of third party payments and are forced to rely on court-appointed counsel, they may be convicted because of inadequate representation rather than because they are guilty.

We can respond in two ways to the concern about compromising the interests of defendants and the integrity of the legal system. First, neither the needs of defendants nor the integrity of the legal system can justify unethical conduct by lawyers. Second, defendants typically do not suffer because court-appointed counsel represent them.

Zealous advocacy is desirable, but only within the bounds of morality. Codes of professional responsibility make clear that lawyers may not use unethical means to advance their clients' interests. Indeed, even when an ethical violation would enhance the likelihood of a just result, the violation is not permitted. An attorney may not, for example, introduce false testimony to ensure the acquittal of an innocent defendant.[66] If accepting third party payments would entail assistance in criminal activity of clients, then the payments must be turned down even if doing so might compromise the quality of the defendant's representation. We also cannot justify third party payments in terms of the integrity of the legal system. Permitting

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64. As for preserving the integrity of the legal system, if convictions might be obtained because of inadequate counsel, it becomes difficult for the public to trust that convictions are valid. Recent concern about the administration of the death penalty, for example, reflects in part the concern that many persons on death row are there because they were represented by underfinanced or even incompetent lawyers. *See* Jim Yardley, *Lawyers Call For Changes In Death Penalty in Texas*, N.Y. Times, Oct. 16, 2000, at A16; *see generally,* David L. Szlanfucht, *Are Capital Defense Lawyers Educable? A Moderately Hopeful Report from the Trenches*, 19 Miss. C. L. Rev. 305, 308-32 (1999) (surveying ineffective assistance of counsel claims in the state of Georgia's capital cases since 1973); Douglas W. Vick, *Poorhouse Justice: Underfunded Indigent Defense Services and Arbitrary Death Sentences*, 43 Buff. L. Rev. 329, 338 (1995) (calling underfinancing of defense counsel in capital cases a "state-created systemic defect tainting most death sentences rendered in the United States").

65. According to estimates, 75% of defendants are represented by court-appointed lawyers in cases in which there is a right to counsel. Marc L. Miller & Ronald F. Wright, Criminal Procedures: Cases, Statutes, and Executive Materials 820 (1998).

66. For more extensive development of this point, see David Orentlicher, *supra* note 43 at 1362-63.

unethical conduct does not promote the character of the legal system; it undermines the system's integrity. Thus, when Canon 7 of the ABA's Model Code of Professional Responsibility imposed a duty of zealous advocacy, it did so "within the bounds" of a lawyer's legal and ethical obligations.[67]

In any case, it does not appear that criminal defendants on average do better with privately retained counsel than with court-appointed counsel. Despite common belief to the contrary, the majority of studies show no difference between fee-charging lawyers and publicly paid lawyers.[68] In general, court-appointed counsel provide as good a level of representation as privately retained counsel, whether measured in terms of the quality of the legal services or in terms of jury outcomes.[69]

Fears about intrusive inquiries by lawyers or the unavailability of private attorneys, then, need not alter the analysis. If attorneys have reason to suspect that a third party is paying legal fees for a defendant as compensation for the defendant's collaboration in crime, the attorneys must make the inquiries necessary to dispel their suspicions. If they cannot adequately refute their suspicions, they must send the defendant to court-appointed counsel.

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67. Model Code, *supra* note 27, Canon 7. The full text of Canon 7 is, "A Lawyer Should Represent a Client Zealously Within the Bounds of the Law." *Id.* According to the first ethical consideration that explains Canon 7, "[t]he duty of a lawyer, both to his client and to the legal system, is to represent his client zealously within the bounds of law, which includes Disciplinary Rules and enforceable professional regulations." *Id.* at EC 7-1.

68. *See* Floyd Feeney & Patrick G. Jackson, *Public Defenders, Assigned Counsel, Retained Counsel: Does the Type of Criminal Defense Counsel Matter?*, 22 Rutgers L.J. 361, 365-78, 407-08 (1991).

69. *See id.* For further discussion of this point, see Orentlicher, *supra* note 43, at 1364-65.

If court-appointed counsel deliver the same quality of representation as privately retained counsel, we might conclude that an attorney who accepts third party payment does not foster the criminal conspiracy by providing representation. The attorney would not be supplying a service that is any different than the service that would be supplied by a court-appointed lawyer. In other words, once criminal defendants are entitled to a lawyer, a private attorney arguably does not add to a criminal conspiracy by acting as defense counsel for members of the conspiracy.

Despite the apparent equivalence of court-appointed and privately retained counsel, a lawyer would promote a criminal conspiracy by accepting third party payment premised on the defendant's collaboration in crime. Even if the promise to pay attorneys' fees in the event of arrest has no "objective" value because the privately retained attorney would be no better than the court-appointed lawyer, the important question is whether the promise to pay encouraged the defendant to participate in the conspiracy. If the defendant viewed the promise to pay as having value, then the lawyer would be contributing to the conspiracy by representing the defendant. In addition, if the promise to pay is not designed to compensate the defendant for participating in the conspiracy, it would be designed to discourage unfavorable testimony by the defendant. And, that purpose would mean that a lawyer would be facilitating an obstruction of justice by accepting the third party payment. *See supra* text accompanying notes 51-52.

III. THIRD PARTY FEE PAYMENTS AND RELATED ETHICAL CONCERNS

A. *Limits on Third Party Payments Reinforce Limits on Conflicts of Interest*

A requirement that attorneys turn down many fees paid by third parties may seem harsh. However, as I have discussed, the requirement is necessary to ensure that a lawyer's expertise is not used to assist a client's criminal activity.

Limits on third party fees are also valuable because they help address another important ethical concern with such payments. When third parties pay defendants' legal bills, the payments may compromise the quality of representation by creating a conflict for the lawyer between the interests of the defendant and the interests of the payer. The lawyer owes a duty of loyalty to the defendant-client, but the lawyer will also have obligations to the fee payer, and the duties and obligations might come into conflict.

The actual extent of the lawyer's obligations to the fee payer is a matter of ongoing debate.[70] Some scholars and courts take the view that the fee payer is not a client and that the defendant is the only client;[71] others take the view that the defendant and the fee payer are both clients.[72] A third group argues that because the attorney-client relationship is a consensual one, lawyers, fee payers and defendants can agree to a one- or two-client arrangement.[73]

There are additional complexities to the debate. Those who support a two-client view often make that argument in the context of

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70. 1 Hazard & Hodes, *supra* note 16, § 1.7:303, at 256.5 to .10 (Supp. 1998).

71. *See* Atlanta Int'l Ins. Co. v. Bell, 475 N.W.2d 294, 297-99 (Mich. 1991); John K. Morris, *Conflicts of Interest in Defending Under Liability Insurance Policies: A Proposed Solution*, 1981 Utah L. Rev. 457, 465-66 (recommending that insurance defense lawyers give their undivided loyalty to the insured but also that insurers be able to select the lawyer for the insured).

72. *See* McCourt Co. v. FPC Props., Inc., 434 N.E.2d 1234, 1235 (Mass. 1982); 3 Ronald E. Mallen & Jeffrey M. Smith, Legal Malpractice § 28.3, at 487-88 (4th ed. 1996) (taking two-client view for insurance defense counsel); Douglas R. Richmond, *Lost in the Eternal Triangle of Insurance Defense Ethics*, 9 Geo. J. Legal Ethics 475, 482-83 (1996) (same).

73. *See* Charles Silver, *Does Insurance Defense Counsel Represent the Company or the Insured?*, 72 Tex. L. Rev. 1583, 1602-14 (1994). The Restatement of the Law Governing Lawyers generally takes this position as well. *See* Restatement (Third) of the Law Governing Lawyers § 134 reporter's note cmt. f (2000) (observing that "whether only the insured or both insured and insurer (as co-clients) enter into a client-lawyer relationship with the designated lawyer is a question to be determined on the facts of the particular case"). Still, the Restatement also seems to adopt a presumption that the fee payer is not a client. *See id.* § 14 cmt. c (observing that "paying a lawyer does not by itself create a client-lawyer relationship with the payor if the circumstances indicate that the lawyer was to represent someone else, for example, when an insurance company designates a lawyer to represent an insured (see § 134)").

situations in which the fee payer is an insurance company that retains a lawyer to defend a person insured by the company. When the fee payer is a crime boss, the payer's interests are not the same as those of an insurance company and therefore may not justify giving the payer client status.[74] Indeed, in the criminal defense context, the majority of courts do not recognize the fee payer as having client status.[75] More importantly, the client versus non-client characterization oversimplifies the analysis. It is not an all-or-nothing decision.[76] A fee payer might have some of the rights of a client but not the full rights of a traditional client.[77]

The important issue, then, is to what extent does a fee payer have the rights of a client. In response to this question, Nancy Moore has observed that rules of professional responsibility prevent or limit the ability of fee payers to exercise the rights of clients.[78] For example, Model Rule 1.8(f) prohibits fee payers from interfering with "the lawyer's independence of professional judgment or with the client-lawyer relationship."[79]

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74. In the insurance context, the insured's incentive to defeat the claim may be weakened by the fact that the company has assumed responsibility for paying any judgment (up to the limits of liability). Because the company may be the only party at financial risk, it may need to be involved in the litigation to fully protect its interests. Silver, *supra* note 73, at 1594-96. It may also be in the insured's interests for the insurer to have co-client status. *Id.* at 1596-98 (discussing the fact that insurers enjoy greater expertise and effectiveness at responding to insurance claims than do insured individuals); Richmond, *supra* note 72, at 481-82 (same).

75. *See* Jeffrey Epstein, Note, *Benefactor Defense Before the Grand Jury: The Legal Advice and Incrimination Theories of the Attorney-Client Privilege*, 6 Cardozo L. Rev. 537, 559-60 (1985).

Other fee payer situations involve corporations paying legal fees for employees, parents for children and non-profit organizations funding public interest litigation on behalf of individual clients. Moore, *supra* note 40, at 587.

76. We can draw an analogy to property rights. It is not correct to say that one either has a property right or does not have a property right. Rather, the issue is the extent to which one has property rights. Property, it is said, entails a bundle of rights, and the question is how big a bundle a person has. Brotherton v. Cleveland, 923 F.2d 477, 481 (6th Cir. 1991). A tenant has fewer rights with regard to an apartment than a landlord, but more rights than a non-tenant. An owner of a house that has historic landmark status has fewer rights to modify the house than an owner of a house without landmark status.

77. Silver, *supra* note 73, at 1603; *see also* John Leubsdorf, *Pluralizing the Client-Lawyer Relationship*, 77 Cornell L. Rev. 825, 830 (1992); Robert E. O'Malley, *Ethics Principles for the Insurer, the Insured, and Defense Counsel: The Eternal Triangle Reformed*, 66 Tul. L. Rev. 511, 520-25 (1991) (characterizing the insured as the only client of the lawyer when the fee payer is an insurance company, but proposing that the insurer be able "to control the defense" and "settle without the consent of the insured").

78. Moore, *supra* note 40, at 589-90; *see also* Geoffrey C. Hazard, Jr., *Triangular Lawyer Relationships: An Exploratory Analysis*, 1 Geo. J. Legal Ethics 15, 26-31 (1987) (discussing the limitations of the rules of professional responsibility on the role of third parties to the lawyer-client relationship when the third parties are not necessarily fee payers (e.g., guardians of a ward being represented by a lawyer)).

79. Model Rules, *supra* note 27, R. 1.8(f).

Whether fee payers in the *Hodge and Zweig* type of case can act as clients or not is beyond the scope of this article. Rather, the important point is that the interests of the fee payer and the defendant may pull a lawyer in different directions. Even if the fee payer is not a client or is not otherwise due a formal duty of loyalty, the lawyer may still feel a sense of loyalty to the payer.[80]

The conflict of interest raised by third party payments is an important one. What is best for the defendant may not always be best for the fee payer. If lawyers try to serve the defendants' interests, they may compromise the fee payers' interests, and if lawyers try to serve the fee payers' interests, they may compromise the defendants' interests. Consider, for example, cases like *Hodge and Zweig* in which a drug ringleader pays the legal fees for the minions after they are arrested.[81] In many of those cases, the minions could secure a reduced sentence by testifying against the ringleader. If lawyers act solely in the defendants' interests, they might encourage the minions to testify. If instead the lawyers act in the fee payers' interests, they might advise the minions to reject the deal and go to trial.[82]

A lawyer's personal interests could also influence the advice given to the defendant. If the lawyer has, or hopes for, an ongoing relationship with the fee payer, then the lawyer will have a strong economic incentive to ensure that the defendant does not do anything to compromise the interests of the fee payer.[83] If the minions testify against the ringleader, for example, the ringleader may blame the lawyer. In any case, if the ringleader is incarcerated because of a minion's testimony, the ringleader will no longer be a paying client.

Ethics provisions provide some response to this conflict of interest, but the response may not be very effective. As I have indicated, Model Rule 1.8(f) permits third party payments only if "there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship."[84] Rule 1.8(f) also requires an

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80. *See* Hazard, Ethics *supra* note 59, at 45; 1 Hazard & Hodes, *supra* note 16, § 1.7:303, at 256.7 to .10 (Supp. 1998); Brown, *supra* note 24, at 1057-58; *see also* Gary T. Lowenthal, *Joint Representation in Criminal Cases: A Critical Appraisal*, 64 Va. L. Rev. 939, 960-61 (1978) (discussing the conflict facing a lawyer who is paid by a third party to represent a defendant).

81. *See* discussion *supra* Part I.

82. *See* Wood v. Georgia, 450 U.S. 261, 269 (1981); Dershowitz, *supra* note 47, at 398-99; Karlan, *supra* note 47, at 690-91.

83. Rhea Kemble Brecher, *The Sixth Amendment and the Right to Counsel*, 136 U. Pa. L. Rev. 1957, 1962 (1988); Karlan, *supra* note 47, at 690-93; Bruce A. Green, *Her Brother's Keeper: The Prosecutor's Responsibility When Defense Counsel Has a Potential Conflict of Interest*, 16 Am. J. Crim. L. 323, 358 n.119 (1989).

84. Model Rules, *supra* note 27, R. 1.8(f). Model Rule 1.7(b) has a similar prohibition. According to Rule 1.7(b), lawyers may not represent a client if the representation would be "materially limited by the lawyer's responsibilities" to another person unless the "lawyer reasonably believes the representation will not be adversely affected" and the client's informed consent is obtained. *Id.* 1.7(b). In some cases, Rule 1.7(a)'s limitation on dual representation of clients with adverse interests

attorney to obtain the informed consent of a defendant before the attorney can accept payment of legal fees from a third party.[85] But, neither condition affords strong protection. The defendant's consent is not a serious obstacle to third party payments. In many cases, defendants will not be able to afford their own lawyer, or they may not feel free to decline the fee payer's offer to pay legal expenses.[86] Moreover, while defendants should be protected by the requirement that the fee payer not interfere with the client-lawyer relationship, there is likely to be a good deal of slippage. Conflicts of interest are dangerous because they can subconsciously influence one's judgment. As a result, lawyers may unwittingly act in violation of Rule 1.8(f).[87] The Restatement (Third) of the Law Governing Lawyers increases the risk of slippage by explicitly allowing fee payers to have some control over the lawyer's conduct. According to § 134(2), the fee payer can direct the lawyer's conduct if "the direction is reasonable in scope and character."[88] To be sure, the comments to § 134 expressly reject arrangements in which the fee payer has conditioned payment on the defendant's agreement not to implicate the fee payer in the crimes charged against the defendant,[89] but the concern here is when the influence occurs in less explicit ways. Fee payers can prevent possible incrimination without a formal commitment by the defendant not to do so as a condition of the payments.

Courts have often addressed the third party payer problem by preventing the arrangements. In some cases, trial courts will disqualify counsel from the representation,[90] and the Supreme Court

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will apply to arrangements with third party payers. *See also* 1 Hazard & Hodes, *supra* note 16, § 1.7:303 at 256.5 to .10 (Supp. 1998) (discussing the application of Rule 1.7 to third party payment situations).

85. A third requirement is that client confidentiality be protected. Model Rules, *supra* note 27, R. 1.8(f)(3).

86. The defendant may not feel free to decline the offer to pay legal expenses in cases in which the third party payer is trying to obstruct justice by discouraging unfavorable testimony. *See supra* text accompanying notes 51-52.

87. For a discussion of other weaknesses of Rule 1.8(f) in the context of third party payment of criminal defense fees, see Roman M. Roszkewycz, *Third Party Payment of Criminal Defense Fees: What Lawyers Should Tell Potential Clients and Their Benefactors Pursuant to (an Amended) Model Rule 1.8(f)*, 7 Geo. J. Legal Ethics 573, 576-89 (1993).

88. Restatement (Third) of the Law Governing Lawyers § 134(2) (2000).

89. *Id.* § 134 illus. 2. For discussion of § 134, see Moore, *supra* note 40, at 607-09 (discussing § 215 of the Proposed Final Draft No. 1 1996, predecessor to § 134).

90. Wood v. Georgia, 450 U.S. 261, 272-74 (1981) (vacating conviction and remanding to lower court with instructions to consider whether employer's payment of legal fees compromised the defense of employees); United States v. Padilla-Martinez, 762 F.2d 942, 946-49 (11th Cir. 1985) (upholding disqualification of counsel retained to represent eleven co-defendants in part because evidence suggested that the attorneys would represent the interests of the fee payer rather than those of the defendants); United States v. Gotti, 771 F. Supp. 552, 565-67 (E.D.N.Y. 1991), *aff'd sub nom.* United States v. Locascio, 6 F.3d 924, 931-33 (2d Cir. 1993) (disqualifying attorneys who faced conflicts of interest by virtue of their being paid by a reputed

has indicated that trial judges have the discretion to reject the defendant's acceptance of the conflict of interest.[91]

Still, many courts permit third party payments despite the concerns that are raised,[92] and there is no per se rule against the payments.[93] Rather, courts consider the severity of the conflict of interest in the case before them. Or, in terms of the language used, courts consider whether there is an *actual* conflict of interest or merely a *potential* conflict of interest.[94] Moreover, some courts seem insufficiently sensitive to conflicts of interest concerns. In *Hodge and Zweig*, for example, the court commented, "[f]rom all indications in the record, [Hodge and Zweig] acted ethically and professionally throughout this matter."[95]

In short, a requirement that lawyers reject many third party payments would both reinforce conflicts of interest principles and address situations in which existing conflicts rules are insufficient to prevent deleterious effects.

B. *Relationship to Prohibitions on Money Laundering*

In many third party payment cases, lawyers must reject payment regardless of the third party concern. If ringleaders are paying legal expenses for their minions, they will often be paying with the proceeds of illicit activity. Hodge and Zweig, for example, may have been paid from the profits earned by the Sandino Gang in their importing and

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crime boss to represent defendants in the boss' crime family); *see also In re* Abrams, 266 A.2d 275, 278 (N.J. 1970) (upholding reprimand of lawyer who accepted a third party fee from a crime boss, in part because such payments would divide the attorney's loyalty).

91. Wheat v. United States, 486 U.S. 153, 164 (1988) (holding that courts may override a defendant's waiver of an attorney's conflict of interest in the context of a lawyer retained by multiple co-defendants); *see also* Bruce A. Green, *"Through a Glass, Darkly": How the Court Sees Motions to Disqualify Criminal Defense Lawyers*, 89 Colum. L. Rev. 1201, 1249-63 (1989) (discussing how judges should exercise their discretion under *Wheat*).

92. *See, e.g.*, United States v. Shaughnessy, 782 F.2d 118, 120 (8th Cir. 1986) (holding that a defendant represented by an attorney retained on his behalf by two co-defendants was not denied effective assistance of counsel); United States v. Carpenter, 769 F.2d 258, 263 (5th Cir. 1985) (allowing payment by third party without hearing even when the third party is alleged participant); United States v. Pryba, 674 F. Supp. 1502, 1503-04 (E.D. Va. 1987) (mere possibility that defense counsel was being paid by third parties does not disqualify counsel).

93. *Carpenter*, 769 F.2d at 263.

94. *Wood*, 450 U.S. at 271-72 (expressing concern whether the conflict of interest was "sufficiently apparent" to constitute a deprivation of due process and remanding for an assessment of whether an "actual conflict of interest existed"); *Wheat*, 486 U.S. at 161-63 (observing that a trial court's decision whether to disqualify counsel depends on whether counsel faces a potential or actual conflict of interest); Cuyler v. Sullivan, 446 U.S. 335, 349-50 (1980) (noting that actual conflicts of interest are grounds for reversal without the need to demonstrate prejudice).

95. United States v. Hodge and Zweig, 548 F.2d 1347, 1349 (9th Cir. 1977).

selling of marijuana.[96] If so, the lawyers would have been laundering dirty money, something that they were ethically and legally prohibited from doing.[97]

Still, there are some important differences between a prohibition on third party payments and a ban on money laundering. Perhaps the most important difference can be illustrated by a variation on the facts of *Hodge and Zweig*. In that case, the lawyers were representing an organization, the Sandino Gang, which may have been exclusively in the business of importing and selling illicit drugs. If so, the payments to the lawyers from Sandino were unacceptable both because they constituted compensation for participating in the criminal conspiracy and because they constituted the proceeds of illicit activity. Suppose instead that the Sandino Gang operated a combination of licit and illicit businesses. In addition to importing marijuana and other drugs, assume that the Sandino Gang also imported fruits and vegetables that it sold to supermarkets in California. Suppose further that the profits from the produce side of the business were sufficient to cover legal expenses for the drug side of the business. Under the standard analysis, prohibitions on accepting tainted funds would not prevent lawyers from representing members of the Sandino Gang when they were charged with illicit drug distribution.[98] Sandino's lawyers could assume that their payments were coming from the produce profits rather than from the drug selling.

Although bans on money laundering would not apply, limits on third party payments would apply when crime rings engage in a mix of legitimate and illegitimate businesses. The issue for third party payments is whether they constitute compensation for collaboration in crime (or an inducement to obstruct justice[99]). If they do, it is irrelevant whether the funds come from the criminal activity for which they are paid or whether they come from other sources.

We can also invoke a theoretical difference between a ban on accepting third party payments and a ban on accepting tainted funds that currently does not translate into a practical difference, but that might in the future. This difference can be illustrated by adding one

96. Sandino and his associates were charged with conspiracy to import marijuana. *Id.* at 1350.

97. Orentlicher, *supra* note 43, at 1355-57. Despite the fact that Hodge and Zweig were representing drug traffickers, the court did not seem to think they were laundering illicit funds. According to the court, "[f]rom all indications in the record, [Hodge and Zweig] acted ethically and professionally throughout this matter." *Hodge and Zweig*, 548 F.2d at 1349.

98. 1 Hazard & Hodes, *supra* note 16, § 1.6:405, at 210-11 (Supp. 1996). *But see* Orentlicher, *supra* note 43, at 1349-55 (arguing that people mix their licit and illicit funds and that therefore perpetrators of economic crimes will always be paying at least in part with illicit funds).

99. *See supra* text accompanying notes 51-52 (noting that even if crime bosses pay attorneys' fees for their minions without a prior promise to do so, they are probably doing so to prevent the minions from testifying against them).

assumption to the facts of *Hodge and Zweig*. Suppose that, when Sandino paid Hodge and Zweig to represent his confederates, he paid with the proceeds of the drug importing and selling. Many commentators would say that money-laundering bans should not prevent Hodge and Zweig from accepting the funds because there is a distinction between ill-gotten gains that belong to someone else and ill-gotten gains that do not. For example, if a criminal obtains money by robbing a bank, the money rightfully belongs to the bank. In contrast, a drug seller's or prostitute's ill-gotten gains do not rightfully belong to someone else. The people who purchased the drugs or the sexual favors got what they paid for. Accordingly, some say, we should distinguish between lawyers who accept tainted funds that belong to other people and lawyers who accept tainted funds that do not really belong to another person.[100] Other commentators take the view that ill-gotten gains should not be accepted regardless of their source, that lawyers should never take tainted funds.[101] But, whether or not one takes into account the source of ill-gotten gains for money laundering prohibitions, it would not matter in terms of third party payments. Again, the key issue there is why the third party is paying the fees, not where the payments come from. If Sandino had been paying legal fees for his minions to compensate them or to buy their silence, it would not matter whether the funds were from robbing a bank or selling marijuana.

Currently, when deciding whether attorneys' fees may be forfeited because they represent the ill-gotten gains of clients, courts do not distinguish between funds that belong to someone else, and funds that do not.[102] If the law changes, however, and profits from drug-selling, gambling or prostitution could be accepted by lawyers without violating money laundering prohibitions, the ban on third party payments would fill in where the money laundering prohibition left off.

C. *Third Party Payments for Corporate Defendants*

So far, I have discussed third party payments of attorneys' fees in the context of cases like *Hodge and Zweig* that involve a collaboration intentionally designed for repeated criminal activity. The fee payer might be a crime boss in a drug distribution ring, as in *Hodge and Zweig*, or in other organized crime, like loansharking or gambling. But, third party payments will also be common in the context of criminal prosecutions against corporate officers who are charged with

100. Cloud, *supra* note 57, at 55-56; Winick, *supra* note 57, at 815-17.

101. 1 Hazard & Hodes, *supra* note 16, § 1.6:403, at 199 (2d ed. 1990); Orentlicher, *supra* note 43, at 1355-57.

102. This partly reflects the existence of statutes that make contraband, like profits from drug-trafficking, the property of the government. 1 Hazard & Hodes, *supra* note 16, § 1.6:403, at 199 (2d ed. 1990).

price-fixing,[103] tax evasion or environmental dumping. Does the analysis change when the defendant is engaged in activity that is primarily legal but occasionally becomes illicit?

In some ways, the corporate crime setting would not be distinguishable. Although corporations are not usually organized to pursue criminal activities, and they are almost exclusively engaged in legal, indeed desirable, activities, the issue is whether the lawyer would be assisting the corporation's activities when the corporation was engaged in crime. More specifically, the issue is whether the lawyer would be drawn into the criminal conspiracy by virtue of the corporation compensating its official for participating in crime with payment of the official's legal expenses. Would the corporation be fulfilling a promise to pay attorneys' fees in the event that a corporate officer was criminally charged?

It may be that the corporation would be fulfilling an earlier promise to pay, but the promise probably could not be viewed as compensation for participating in the criminal conspiracy. Some companies do promise to pay legal expenses for some officers, but those promises may be limited to the defense of civil suits. Even if criminal defense costs are included, the promises would not represent a quid pro quo for participating in a criminal conspiracy. Rather, they would ordinarily represent an assurance that the company will stand behind its officers if they are unfairly charged with criminal activities. Accordingly, lawyers would not be caught up in the criminal conspiracy by representing the company's officers.

One could imagine a setting in which corporate officers explicitly and knowingly plot illegal activity, and the senior officer secures the participation of the others by reminding them of the company's promise to pay legal expenses. If such a scenario occurred, and the lawyer had reason to suspect that this was going on, then the third party ban would apply. But that kind of scenario seems unlikely.

D. *Enforcing a Ban on Third Party Payments*

An important question is whether it would be possible to enforce a prohibition on fee payments by third parties. A ban on third party payments might not make any practical difference, raising the question whether there is any point in adopting the ban.

It is not difficult to see ways in which a third party ban could be evaded. If lawyers refuse third party payments for criminal defendants, a crime boss could give the money to the defendant who could then pay the lawyer directly. Or, the ringleader could deposit money into a bank account belonging to a relative of the defendant.

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103. *See, e.g.*, United States v. Andreas, 23 F. Supp. 2d 855 (N.D. Ill. 1998) (involving charges of price-fixing by Archer Daniels Midland).

Because the possibility of evasion is real, lawyers will often need to ask defendants about the source of payments.[104] Even if the defendant pays, lawyers need to ensure that the funds are not coming from confederates in crime. Still, despite the diligent efforts of lawyers, many third party payments are likely to evade detection.[105] There are limits to the ability of lawyers to pierce a veil of legitimacy, and we cannot expect lawyers to play the role of Internal Revenue Service auditors.

Although this is a problem, it is not sufficient reason to permit third party payments when they constitute compensation for collaboration in crime. The fact that a rule can be evaded is not a reason to scrap the rule and tolerate violations. In addition, in some cases, crime bosses or defendants will be unaware of the prohibition on third party payments from co-conspirators and will be unable to retain a lawyer when they propose a third party payment arrangement. Even if ringleaders or minions shop around after being denied representation at first and disguise the source of payment, they will at least have been limited in their ability to use third party payments. They will not have been able to secure their top choice, or choices, of lawyers.

More importantly, for crime bosses, paying legal fees to their minions is a less desirable option than reimbursing the lawyer directly. The two methods of payment are not completely fungible. When the minions exercise control over the fee payments, they can also exercise control over the choice of lawyer.[106] Recall that crime bosses pay legal expenses not only to induce participation in their crime rings but also to divide legal counsel's loyalties. A lawyer representing a minion but paid by the ringleader will be more inclined to discourage agreements to testify against the ringleader than would a lawyer paid by the minion. Accordingly, even if the rule is evaded, its evasion weakens the harmful effects of the fee payment. In addition, because paying the legal fees to the co-conspirators is less attractive to the crime boss than paying the lawyer directly, it may make it less likely that the crime boss will pay the minions' legal expenses. Limits on third party payments may not be fully effective, but they will have some meaningful effect.

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104. *See* discussion *supra* Part II.A.

105. Some lawyers will miss third party payments because they do not look very hard to find them.

106. In some cases, the minions will choose the ringleader's preferred lawyer regardless of how the money reaches the lawyer. Crime bosses can exert their influence in many ways, and minions may fear for their lives or those of their families if they do not proceed according to the boss' wishes. Still, it is easier for a minion to testify against the crime ring (and enter a witness protection program if necessary) if the minion has the funds to pay the lawyer.

CONCLUSION

After the Ninth Circuit's decision in *United States v. Hodge and Zweig*, it became clear that criminal defendants might compromise their attorney-client privilege if their legal expenses were paid by third parties who were their collaborators in crime. It should have been equally clear from the logic of the decision that criminal defense lawyers would often have to decline representation when a defendant's legal expenses were paid by a third party. Ethics codes and judicial holdings should recognize this implication of *Hodge and Zweig* to prevent lawyers from being used to foster the activities of criminal conspiracies. Lawyers must represent their clients vigorously, but they must not help clients to commit crimes.

In addition to giving full force to the requirement that lawyers not participate in their clients' crimes, bans on third party payments would reinforce other important ethical and legal rules of professional responsibility. They would reduce the possibility of representation being compromised by conflicts of interest, and they would reduce the ability of criminals to avoid money-laundering prohibitions when securing legal counsel.