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## Asset Forfeiture and Attorneys' Fees: The Zero-Sum Game

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## NOTES

### ASSET FORFEITURE AND ATTORNEYS' FEES: THE ZERO-SUM GAME

*Adam R. Cohen\**

*The history of asset forfeiture law spans almost as long as the history of the United States. However, in the last thirty years, the number of crimes for which asset forfeiture can be levied has grown exponentially both on the federal and state levels. As a result, a growing number of defendants face asset forfeiture.*

*When these criminal defendants seek legal representation, they place their attorneys in a difficult legal and ethical position. Asset forfeiture has developed in such a way that the criminal defense attorney cannot provide her client with zealous advocacy if the attorney seeks to retain her fees. Additionally, the law is designed to prevent these attorneys from withdrawing their representation once they learn that the funds being used to pay their fees are tainted.*

*This Note examines these, and other, ethical dilemmas that arise for criminal defense attorneys whose clients may be subject to asset forfeiture. Ultimately, this Note proposes a statutory fix to resolve these ethical issues to ensure that lawyers retain their hard-earned fees and clients receive zealous advocates.*

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### INTRODUCTION

A repeat client comes into your office and notifies you that he is being investigated for insider trading. You, as his potential legal representative, are placed in an ethical bind in which the client's interests are pitted against your own. Your desire to retain your own legal fees impinges upon your ability to zealously represent your client because of the presence of asset forfeiture laws.

An attorney has an ethical and legal responsibility to zealously represent her client.<sup>1</sup> She "owes a duty of care [and] must exercise the competence and diligence normally exercised by lawyers in similar circumstances."<sup>2</sup> This diligence includes conducting a complete and thorough investigation into the facts and circumstances surrounding each case.<sup>3</sup> Ultimately, this investigation will lead to the discovery of material facts which can, and should, be used to impeach and create reasonable doubt as to the prosecution's case. Material facts discovered through the attorney's investigation are central to the decision-making of the client and the defense attorney with regards to plea and proffer agreements, trial strategies, and sentencing. Thus, to zealously represent a client, a defense attorney must devote significant time and resources investigating the underlying facts of a client's indictment.

Since the 1980s, Congress and many states have expanded the use of criminal asset forfeiture for crimes, including insider trading.<sup>4</sup>

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1. See *Hawk v. Superior Court*, 116 Cal. Rptr. 713, 725 (Ct. App. 1974) ("The duty of a lawyer, both to his client and to the legal system, is to represent his client zealously [w]ithin the bounds of the law."); *Schuck v. Zeff & Zeff, P.C.*, 311 N.W.2d 322, 323 (Mich. Ct. App. 1981) (citing *Friedman v. Dozorc*, 268 N.W.2d 673 (Mich. Ct. App. 1978)) (holding that "an attorney has a duty to be a zealous advocate" and that this obligation to the client "permits the lawyer to assert that view of the law most favorable to the client"); *LoBiondo v. Schwartz*, 970 A.2d 1007, 1013 (N.J. 2009) ("[T]he attorney's primary duty is to be a zealous advocate for his or her own client.").

2. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 52(1) (AM. LAW INST. 2000).

3. *Id.* § 52 cmt. (c).

4. Congress has discovered a somewhat confusing means to enable courts to order asset forfeiture for insider trading offenses. Pursuant to 18 U.S.C. § 981(a)(1)(C), a court may order

Unfortunately, these asset-forfeiture laws clash with the attorney's ability to conduct investigations necessary to fulfill her responsibility to be a zealous advocate. Criminal asset forfeiture statutes only allow an attorney to collect fees where she is "reasonably without cause to believe that the property was subject to forfeiture."<sup>5</sup> Accordingly, an attorney must avoid learning that the funds being used to pay her legal fees stem from an illegal source.

The conflicting need to conduct a thorough investigation and to remain in the dark about a client's funds puts an attorney in a difficult situation. On the one hand, an attorney who conducts a full and complete investigation risks losing fees because she may develop cause to believe that the property used to pay her will be subject to forfeiture. On the other hand, an attorney who does not conduct a full investigation may be able to recoup all of her legal fees, but she could face disciplinary action, including potential disbarment, for failing to act as a zealous advocate.<sup>6</sup> Thus, in cases in which an attorney represents a client charged with a crime where asset forfeiture can be levied, the attorney must walk a fine line to be compensated for her service. In essence, the law incentivizes attorneys to inadequately represent their clients in order to recoup legal fees.

Mens rea crimes, like insider trading, complicate the inherent tension between performing due diligence and making sure one's fees will not be subject to asset forfeiture. In insider trading cases, there is often little doubt as to *whether* a trade occurred—one way or another, an individual received a windfall of cash by making either a wise or illegal decision. Often, the only question for a jury is whether or not the defendant acted with scienter.<sup>7</sup> If the decision was made in willful violation of securities laws, the trade is illegal

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forfeiture for "any offense constituting 'specified unlawful activity'" as defined in § 1956(c)(7). 18 U.S.C. § 981(a)(1)(C) (2012). Section 1956(c)(7)(A) incorporates "any act or activity constituting an offense listed in section 1961(1)." 18 U.S.C. § 1956(c)(7)(A) (2012). Section 1961(1)(D) lists "any offense involving . . . fraud in the sale of securities." 18 U.S.C. § 1961(1)(D) (2012). Insider trading is one such crime. *See* United States v. Contorinis, 692 F.3d 136, 145 n.2 (2d Cir. 2012).

5. 21 U.S.C. § 853(c) (2012).

6. *See* MONROE H. FREEDMAN & ABBE SMITH, UNDERSTANDING LAWYERS' ETHICS 80 (4th ed. 2010).

7. Liability for securities fraud requires evidence that the defendant "acted with scienter." United States v. Newman, 773 F.3d 438, 447 (2d Cir. 2014). Scienter is defined as "a mental state embracing intent to deceive, manipulate, or defraud." Ernst & Ernst v. Hochfelder, 425 U.S. 185, 193 n.12 (1976). To establish a criminal violation of the securities laws, the government must show that the defendant acted "willfully." 15 U.S.C. § 78ff(a) (2012). Willfully is defined as "a realization on the defendant's part that he was doing a wrongful act under the securities laws." United States v. Cassese, 428 F.3d 92, 98 (2d Cir. 2005) (citing United States v. Peltz, 433 F.2d 48, 55 (2d Cir. 1970)); *see also* Peter J. Henning, *There Are No Perry Mason Moments in Insider Trading Cases*, N.Y. TIMES (Mar. 20, 2017), <https://www.nytimes.com/2017/03/20/business/dealbook/insider-trading-cases-proof.html> [<https://perma.cc/B5WN-STST>] (noting that white collar prosecutions are difficult because white collar crimes "are quintessentially offenses of the mind, revolving around intent and knowledge" where "no one disputes what happened while everything depends on what the defendant understood and intended"). For a discussion of additional problems with insider trading law, *see* Austin Green, Note, (*Beyond*) *Family Ties: Remote Tippees in a Post-Salman Era*, 85 FORDHAM L. REV. 2769, 2773 (2017).

and the funds are tainted.<sup>8</sup> If the decision was not made in willful violation, the trade is legal and the funds are clean. In these situations, it is imperative for a defense attorney to conduct a full investigation to determine where the information came from and how likely it is that the government will be able to prove beyond a reasonable doubt that the defendant acted with scienter. It is only through a detailed investigation that an attorney can know how her client will fare in front of a jury or in plea negotiations.

An attorney may be able to successfully and ethically use “avoidance techniques” to refrain from discovering whether her client acted with scienter and whether the funds were tainted.<sup>9</sup> Unfortunately, the law imposes yet another obstacle to defense counsels’ receipt of payment—they must conduct a separate investigation into the source of fees. This investigation, referred to as a *Moffitt* investigation,<sup>10</sup> requires that an attorney ask her client direct questions about the source and cleanliness of the client’s funds.<sup>11</sup> The attorney is also obligated to take additional steps to verify that her client’s answers are objectively reasonable.<sup>12</sup> Often, if not always, the *Moffitt* investigation is in direct conflict with an attorney’s duties and responsibilities in her fact-finding investigation because it restricts an attorney’s ability to develop an alternate theory of the case and drastically limits, if not eliminates, her ability to carry out her duty of zealous representation.<sup>13</sup>

This Note explores the ethical dilemmas an attorney confronts when representing a client who may face asset forfeiture. Part I of this Note examines asset forfeiture law and the professional and ethical duties an attorney owes her client. It also describes the interplay between these two areas of law. Next, Part II discusses three instances when, while trying to protect her source of income, an attorney may feel compelled to violate the ethical duties she owes to her client. These instances include the initial fact-finding investigation, any motion to withdraw from the case, and the ancillary hearing to keep funds.<sup>14</sup> Finally, Part III proposes a statutory fix to help attorneys keep their funds, while encouraging them to represent clients with potentially tainted assets.

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8. *Newman*, 773 F.3d at 447. For the purposes of this Note, the term “tainted” means “any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result of” the commission of a crime. 21 U.S.C. § 853(a)(1).

9. Defense attorneys often engage in “avoidance techniques” to prevent learning too many damaging facts from clients. These “avoidance techniques” provide defense attorneys with leeway to compose and articulate different strategies to better serve the client. *See infra* Part II.A

10. *See In re Moffitt*, Zwerling & Kemler, P.C., 846 F. Supp. 463, 474 (E.D. Va. 1994), *aff’d sub nom.* *United States v. Moffitt*, Zwerling & Kemler, P.C., 83 F.3d 660 (4th Cir. 1996).

11. *See id.*; *see also infra* Part I.B.2.b.

12. *See In re Moffitt*, 846 F. Supp. at 474.

13. *See infra* Part I.B.2.b.

14. The ancillary hearing provides attorneys with an opportunity to challenge the forfeiture by establishing a legitimate right to the property. *See infra* note 64 and accompanying text.

## I. ASSET FORFEITURE LAWS AND THE ETHICAL DUTIES OWED BY ATTORNEYS

A lawyer representing a client whose assets may be subject to forfeiture faces an ethical dilemma. Part I.A introduces the various duties that an attorney owes to her client. Then, Part I.B outlines current asset forfeiture law and the procedure that third parties can use to secure property subject to forfeiture to which the party has a legitimate right. It goes on to discuss the bona fide purchaser exception to asset forfeiture—the most common and practical means an attorney can employ to secure her fees. Finally, this section synthesizes various court decisions into a comprehensible black letter rule of law.

### *A. The Attorney's Professional Duties to Her Client*

The law imposes a number of legal and ethical duties upon defense attorneys. This Part discusses three duties pertinent to asset forfeiture cases. Part I.A.1 discusses the duty of zealous advocacy. Next, Part I.A.2 explains the duty to maintain client confidences. Finally, Part I.A.3 outlines personal conflicts of interest.

#### 1. The Duty of Zealous Advocacy

First and foremost, a lawyer has a duty to act as a zealous representative of her client.<sup>15</sup> This duty stems from the obligation to give “entire devotion to the interest of [her] client, warm zeal in the maintenance and defense of his rights and the exertion of utmost learning and ability.”<sup>16</sup> Because the client has a right to autonomy and to decide what his interests are,<sup>17</sup> zeal refers to the “dedication with which the lawyer furthers the client’s interests.”<sup>18</sup> Historically, this dedication required the lawyer to consider only the wants, needs, and goals of her client.<sup>19</sup> Accordingly, it is the lawyer’s duty to exercise discretion and to “urge any permissible construction of the law favorable to [her] client . . . if the position . . . is supportable by a good faith argument.”<sup>20</sup>

There are, of course, limits to the duty of zealous advocacy. The Model Code of Professional Responsibility addresses such limitations.<sup>21</sup> Canon 7 of the Code dictates that “[a] lawyer should represent a client zealously

15. See *supra* note 1 and accompanying text.

16. See FREEDMAN & SMITH, *supra* note 6, at 68 (citing A.B.A. CANNONS OF PROFESSIONAL ETHICS 15 (1908)).

17. See *id.*

18. *Id.*

19. See TRIAL OF QUEEN CAROLINE: PART II 3 (James Cockcroft & Co. 1874) (“[A]n advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to others persons, and amongst them to himself, is his first and only duty.”); L. Ray Patterson, *Legal Ethics and the Lawyer's Duty of Loyalty*, 29 EMORY L.J. 909, 918 (1980) (“The prevailing notion among lawyers seems to be that the lawyer’s duty of loyalty to the client is the first, the foremost, and, on occasion, the only duty of the lawyer.”).

20. MODEL CODE OF PROF'L RESPONSIBILITY EC 7-4 (AM. BAR ASS'N 1980).

21. See generally *id.*

within the bounds of the law”<sup>22</sup> because the lawyer owes the duty of zeal not only to individual clients but to the legal system itself.<sup>23</sup> Thus, while the lawyer owes a duty to achieve the client’s goals, such goals must be permitted by law.

A lawyer may be professionally disciplined for providing her client with less than zealous representation.<sup>24</sup> Pursuant to Disciplinary Rule 7-101(A)(1) of the Code, a lawyer “shall not intentionally . . . [f]ail to seek the lawful objectives of [her] client through reasonably available means permitted by law and the Disciplinary Rules.”<sup>25</sup> The affirmative duties imposed by asset forfeiture law greatly increase the likelihood that a defense attorney will face disciplinary action for violating the duty of zealous advocacy.<sup>26</sup>

## 2. The Duty to Maintain Client Confidences

Related to the attorney’s duty of loyalty and zealousness is the duty to maintain client confidences. An attorney will be unable to represent her client with zeal unless she knows the facts of the case. Ordinarily, many facts can only be obtained from the client. In theory, a client will only reveal sensitive facts if he can be assured that his confidences will not be shared with others.<sup>27</sup> Trust between a lawyer and her client is the “cornerstone of the adversary system and effective assistance of counsel.”<sup>28</sup>

Rule 1.6 of the Model Rules of Professional Conduct forbids an attorney from disclosing information relating to the representation of a client unless: the client gives informed consent, disclosure is impliedly authorized to carry out the representation, or disclosure is permitted by one of a number of exceptions.<sup>29</sup>

22. *Id.* Canon 7.

23. *Id.* EC 7-1; *see also* *Nix v. Whiteside*, 475 U.S. 157, 166 (1986) (“Although counsel must take all reasonable lawful means to attain the objectives of the client, counsel is precluded from taking steps or in any way assisting the client in presenting false evidence or otherwise violating the law.”).

24. *See* FREEDMAN & SMITH, *supra* note 6, at 80; *see, e.g.*, *People v. Wyman*, 782 P.2d 339, 342 (Colo. 1989) (disbarring an attorney for violating DR 7-101(A)(1) of the Code); *Iowa Supreme Court Attorney Disciplinary Bd. v. Maxwell*, 705 N.W.2d 477, 480–81 (Iowa 2005) (suspending an attorney for at least one year for, among other things, violating DR 7-101(A)(1) of the Code); *Attorney Grievance Comm’n v. Harris*, 528 A.2d 895, 904 (Md. 1987) (suspending an attorney for six months for violating DR 7-101(A)(1) of the Code); *In re Breen*, 552 A.2d 105, 112 (N.J. 1989) (permanently disbaring attorney where, among other things, the attorney “failed to act with reasonable diligence and promptness in representing the client” for at least two clients).

25. MODEL CODE OF PROF’L RESPONSIBILITY DR 7-101(A)(1).

26. *See infra* Part II.A.

27. *See* FREEDMAN & SMITH, *supra* note 6, at 129–32.

28. *Id.* at 128 (quoting *Linton v. Perrini*, 656 F.2d 207, 212 (6th Cir. 1981)).

29. MODEL RULES OF PROF’L CONDUCT r. 1.6(a) (AM. BAR ASS’N 2017); *id.* r. 1.6(b)(5) cmt. 11. The Model Rules allow attorneys to disclose information to (1) prevent reasonably certain death or substantial bodily harm, (2) prevent the client from committing a crime or fraud, (3) prevent substantial injury to the financial interests or property of another, (4) secure legal advice about the lawyer’s compliance with the Rules, (5) collect a fee, (6) comply with other law or a court order, or (7) detect and resolve conflicts of interest. *Id.*

Related to but distinct from the duty to maintain client confidences is attorney-client privilege,<sup>30</sup> which is recognized in every state of the United States.<sup>31</sup> This privilege protects all communications “relevant to the subject matter of the legal problem on which the client seeks legal assistance”<sup>32</sup> and “applies even where the information sought to be obtained cannot be discovered from any other source.”<sup>33</sup> The mode of communication can be verbal, written, or nonverbal communication such as signs, acting out scenes, or any other form of communicative act.<sup>34</sup> This privilege can be waived by the client.<sup>35</sup>

The Model Code of Professional Responsibility recognizes attorney-client privilege in Disciplinary Rule 4-101.<sup>36</sup> This Rule requires that an attorney preserve the confidences and secrets of a client.<sup>37</sup> The Code defines “confidences” as “information protected by the attorney-client privilege under applicable law” and “secrets” as “other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.”<sup>38</sup> An attorney is subject to discipline for violating this duty.<sup>39</sup> The tension between the duty to keep client confidences and the defense attorney’s desires to retain her fees is apparent in the later stages of representing a client facing asset forfeiture.<sup>40</sup>

### 3. The Duty to Avoid Conflicts of Interest

Conflicts of interest create some of the most frequent and difficult problems confronted by attorneys.<sup>41</sup> Many scholars have discussed and analyzed these conflicts.<sup>42</sup> They are an inherent aspect of the human

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30. See Elizabeth Slater, Note, *A Legal and Ethical Puzzle: Defense Counsel as Quasi Witness*, 85 *FORDHAM L. REV.* 1427, 1435 (2016).

31. See CHARLES W. WOLFRAM, *MODERN LEGAL ETHICS* 242 (1986).

32. *Id.* at 257.

33. JOHN M. BURKOFF, *CRIMINAL DEFENSE ETHICS: LAW AND LIABILITY* 204 (2d ed. 2015).

34. See WOLFRAM, *supra* note 31, at 257.

35. *Id.* at 251; see also BURKOFF, *supra* note 33, at 219 (“Since the attorney-client privilege is the client’s privilege—not the attorney’s—it may be waived by the client or his duly authorized representative, expressly, or implicitly through prior disclosure of confidential information.”).

36. MODEL CODE OF PROF’L RESPONSIBILITY DR 4-101 (AM. BAR ASS’N 1980).

37. *Id.*

38. *Id.*

39. RONALD D. ROTUNDA, *PROFESSIONAL RESPONSIBILITY* 65 (7th ed. 2004); see, e.g., Ky. Bar Ass’n v. Ward, 467 S.W.3d 785, 789 (Ky. 2015) (suspending an attorney for one year for violating DR 4-101); *In re Scali*, 142 A.D.3d 93, 106 (N.Y. App. Div. 2016) (disbarring an attorney for, among other things, violating DR 4-101); *In re Gugino*, 83 A.D.3d 1200, 1200 (N.Y. App. Div. 2011) (suspending attorney for one year for violating, among other things, DR 4-101).

40. See *infra* Part II.C.

41. See FREEDMAN & SMITH, *supra* note 6, at 261.

42. See generally Bruce A. Green, *Conflicts of Interest in Litigation: The Judicial Role*, 65 *FORDHAM L. REV.* 71 (1996); Susan P. Shapiro, *Everests of the Mundane: Conflict of Interest in Real-World Legal Practice*, 69 *FORDHAM L. REV.* 1139 (2000); Edward D. Spurgeon & Mary Jane Ciccarello, *The Lawyer in Other Fiduciary Roles: Policy and Ethical*



condition;<sup>43</sup> whenever there is a reasonable possibility that an individual will be “unable to fulfill all of the legitimate needs or desires of two or more people” there is a conflict of interest.<sup>44</sup> Conflicts of interest need not cause actual harm to create issues; they arise whenever there is a potential for harm.<sup>45</sup>

The rules governing conflicts of interest are codified in Rules 1.7 through 1.13 and Rule 1.18 of the Model Rules of Professional Conduct.<sup>46</sup> There are many types of conflicts: conflicts between a client and another present or former client; conflicts between a client and a person or group who may be paying for the client’s legal assistance; and conflicts between the client and the lawyer’s business or personal interests.<sup>47</sup>

Rule 1.7 bars an attorney from

represent[ing] a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if . . . there is a significant risk that the representation of one or more clients will be materially limited by the lawyer’s responsibilities . . . [or] by a personal interest of the lawyer.<sup>48</sup>

The comments to Rule 1.7 note that “[t]he lawyer’s own interests should not be permitted to have an adverse effect on representation of a client” because where “the probity of a lawyer’s own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice.”<sup>49</sup>

A lawyer’s ability to effectively represent her client may be compromised by her own personal interest when a client’s activities affect her ability to receive legal fees.<sup>50</sup> While these kinds of conflicts are uncommon,<sup>51</sup> there are cases in which the attorney’s personal financial interest in her legal fees and the client’s interest in zealous representation have led to litigation and potential punishment for the attorney.<sup>52</sup> Consequently, a defense attorney must walk a fine line between her personal interests and the interests of her

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*Considerations*, 62 FORDHAM L. REV. 1357 (1994); Christopher N. Wu, *Conflicts of Interest in the Representation of Children in Dependency Cases*, 64 FORDHAM L. REV. 1857 (1996).

43. See FREEDMAN & SMITH, *supra* note 6, at 256.

44. *Id.*

45. See 1 GEOFFREY C. HAZARD, JR. ET AL., *THE LAW OF LAWYERING* § 11.04 (4th ed. 2015) (“[A] conflict of interest exists whenever the attorney-client relationship or the quality of the representation is ‘at risk,’ even if no substantive impropriety—such as a breach of confidentiality or less than zealous representation—in fact eventuates.”).

46. See MODEL RULES OF PROF’L CONDUCT r. 1.7–13, 1.18 (AM. BAR ASS’N 2017); ROTUNDA, *supra* note 39, at 85.

47. See ROTUNDA, *supra* note 39, at 85.

48. MODEL RULES OF PROF’L CONDUCT r. 1.7.

49. *Id.* r. 1.7 cmt. 10.

50. See FREEDMAN & SMITH, *supra* note 6, at 262–63 (discussing how legal fees create a conflict of interest).

51. See *id.* at 263.

52. See, e.g., *Ramirez v. Sturdevant*, 26 Cal. Rptr. 2d 554, 564 (1994).

clients. If she fails to strike the right balance, she can face severe punishment, including disbarment.<sup>53</sup>

### B. Asset Forfeiture Law

As early as 1789, Congress “enacted numerous statutes authorizing the seizure and forfeiture of ships and cargo involved in customs offenses.”<sup>54</sup> Asset forfeiture laws remained, for the most part, constrained in the realm of customs laws for the next 200 years.<sup>55</sup> In recent decades, however, “Congress ha[s] enacted statutes authorizing the forfeiture of property involved in a much wider variety of crimes including counterfeiting, gambling, alien smuggling, and drug trafficking.”<sup>56</sup> Asset forfeiture exploded in 1978 and again in 1984 when Congress amended its drug forfeiture statutes to reach the property used to facilitate a crime in addition to the proceeds of the offense.<sup>57</sup>

By the 1990s, Congress had expanded this authority to include money laundering, car-jacking, espionage, child pornography, bank fraud, and most “white collar” crimes.<sup>58</sup> To date, hundreds of federal criminal offenses have forfeiture provisions.<sup>59</sup> Additionally, “virtually every state . . . has its own body of forfeiture laws. These statutes allow for the seizure of all manner of real and personal property, ranging from a family’s home to a small business’s bank account.”<sup>60</sup>

The central statute of federal asset forfeiture is 18 U.S.C. § 982, which authorizes courts to impose criminal forfeiture on anyone convicted of certain crimes including embezzlement, smuggling, counterfeiting, bribery, identity theft, and various types of fraud.<sup>61</sup> Some crimes are included in the asset-forfeiture matrix through a maze of statutory cross-referencing.<sup>62</sup> In addition to enumerating the types of crimes that subject a defendant to a risk of asset forfeiture, § 982 incorporates an important procedural method by which attorneys can hold onto their fees—the ancillary hearing.<sup>63</sup> Part I.B.1

53. See STEPHEN GILLERS ET AL., REGULATION OF LAWYERS: STATUTES AND STANDARDS 113 (2011 ed. 2011).

54. STEFAN D. CASELLA, ASSET FORFEITURE LAW IN THE UNITED STATES 29 (2d ed. 2013).

55. See Sarah Stillman, *Taken*, NEW YORKER (Aug. 12, 2013), <http://www.newyorker.com/magazine/2013/08/12/taken> [<https://perma.cc/UT4F-AAR2>].

56. CASELLA, *supra* note 54, at 33.

57. See *id.*

58. *Id.* at 34.

59. John Malcolm, *Civil Asset Forfeiture: When Good Intentions Go Awry*, HERITAGE FOUND. (July 22, 2016), <http://www.heritage.org/testimony/civil-asset-forfeiture-when-good-intentions-go-awry> [<https://perma.cc/F4DZ-Y7QU>].

60. *Id.*

61. 18 U.S.C. § 982(a)–(b) (2012). Asset forfeiture can also be levied against many other federal crimes. See Heather J. Garretson, *Federal Criminal Forfeiture: A Royal Pain in the Assets*, 18 S. CAL. REV. L. & SOC. JUST. 45, 49 (2008) (“Not all crimes are covered by § 982; many criminal statutes have forfeiture provisions of their own, including all federal drug felonies, certain crimes involving child pornography, and . . . activities prohibited by RICO.”).

62. See *supra* note 4 and accompanying text.

63. 18 U.S.C. § 982(b)(1) (“The forfeiture of property under this section, including any seizure and disposition of the property and any related judicial or administrative proceeding,

explains how third parties can challenge forfeiture through the ancillary hearing. Then, Part I.B.2 describes the exceptions a third party can prove to secure property subject to forfeiture to which the party has a legitimate right.

### 1. The Ancillary Hearing

Third parties can challenge forfeiture by establishing a legitimate right to property through an ancillary hearing.<sup>64</sup> The rules of the ancillary hearing are outlined in 21 U.S.C. § 853(n).<sup>65</sup> First, the government must publish the entry of an order for forfeiture obtained after the conviction of a criminal.<sup>66</sup> Potential claimants then have thirty days to petition the court for a hearing to adjudicate the petitioner's interest in the property.<sup>67</sup> This petition must be signed by the petitioner and set forth specific facts alleging the nature and extent of the interest and rights in the property.<sup>68</sup> The statute sets a timeline for the hearing to occur "within 30 days of the filing of the petition" but "that is not always feasible."<sup>69</sup>

At the hearing, the petitioner has the right to testify and present evidence and witnesses on his own behalf and may cross-examine the government's witnesses who appear at the hearing.<sup>70</sup> Under § 853(c), the government also has the right to present evidence, examine witnesses, and cross-examine the petitioner's witnesses in support of the government's claim to the property.<sup>71</sup> The petitioner, however, carries the burden of proof and must establish his legal interest in the property by a preponderance of the evidence.<sup>72</sup>

### 2. The Ancillary Hearing Exceptions

A petitioner may prove legal interest in property subject to asset forfeiture by proving either (1) a superior right to the property in question<sup>73</sup> or (2) a bona fide purchaser exception.<sup>74</sup> If the petitioner successfully proves either of these exceptions, the court will amend the order of forfeiture accordingly, and the petitioner will be allowed to retain the property.<sup>75</sup> This Part addresses whether attorneys can use these exceptions to retain their legal fees and thus avoid conflicts of interest with their clients who might be penalized under asset forfeiture laws.

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shall be governed by . . . 21 U.S.C. 853.”). The process and rules of the ancillary hearing are outlined in 21 U.S.C. § 853(n). *See* 21 U.S.C. § 853(n) (2012).

64. *See* DEE R. EDGEWORTH, *ASSET FORFEITURE: PRACTICE AND PROCEDURE IN STATE AND FEDERAL COURTS* 149 (1st ed. 2004).

65. *See* 21 U.S.C. § 853(n).

66. *Id.* § 853(n)(1).

67. *Id.* § 853(n)(2).

68. *Id.* § 853(n)(3).

69. *See* EDGEWORTH, *supra* note 64, at 149–50.

70. 21 U.S.C. § 853(n)(5).

71. *Id.*

72. *United States v. Armstrong*, No. 05-130, 2007 WL 7335173, at \*2 (E.D. La. June 1, 2007).

73. 21 U.S.C. § 853(n)(6)(A).

74. *Id.* § 853(n)(6)(B).

75. *Id.*

*a. Superior Right*

Pursuant to § 853(n)(6)(A), the petitioner of an asset must prove that, at the time of the commission of the acts that gave rise to the forfeiture of the property, he had a superior right to the property.<sup>76</sup> This superior right must defeat the relation-back doctrine, which states that all property vests in the government upon the commission of a criminal offense.<sup>77</sup> Courts have found a superior right for marital interests,<sup>78</sup> bailor interests,<sup>79</sup> and secured creditors' lien interests.<sup>80</sup> For a criminal defense attorney, establishing a right to fees under the superior right exception is nearly impossible because "the proceeds of an offense do not exist before the offense is committed, and when they come into existence, the Government's interest under the relation-back doctrine immediately vests."<sup>81</sup>

*b. The Bona Fide Purchaser Exception*

The more feasible exception for attorneys to secure earned fees is § 853(n)(6)(B).<sup>82</sup> Under this exception, the petitioner must prove that (1) she is a bona fide purchaser for value of the right, title, or interest in the property and (2) at the time of the bona fide purchase, she was reasonably without cause to believe that the property was forfeitable pursuant to one of the criminal acts enumerated or alluded to in the statute.<sup>83</sup> To successfully claim this exception, the petitioner must provide "evidence that the third party gave something of value to the defendant in exchange for an interest in the property found forfeitable."<sup>84</sup> The petitioner cannot simply prove that he did not have actual knowledge that his property was subject to forfeiture.<sup>85</sup> Instead, he must prove an objectively reasonable lack of knowledge.<sup>86</sup>

A white collar criminal defense attorney who wants to retain fees may try to ask for an ancillary hearing and claim the bona fide purchaser exception. To do so, she must meet the elements of the § 853(n)(6)(B) exception.<sup>87</sup> The first element is easily met: she need only provide evidence that she "gave something of value to the defendant in exchange for an interest in the property

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76. *Id.* § 853(n)(6)(A); *see also* EDGEWORTH, *supra* note 64, at 152.

77. 21 U.S.C. § 853(c).

78. *See, e.g.*, United States v. Lester, 85 F.3d 1409, 1415 (9th Cir. 1996).

79. *See, e.g.*, United States v. Alcaraz-Garcia, 79 F.3d 769, 776 (9th Cir. 1996).

80. *See, e.g.*, United States v. Schecter, 251 F.3d 490, 494–95 (4th Cir. 2001).

81. United States v. Timely, 507 F.3d 1125, 1130 (8th Cir. 2007); *see* United States v. Hooper, 229 F.3d 818, 821–22 (9th Cir. 2000) (holding that "§ 853(n)(6)(A) is likely never to apply to proceeds of the crime" as proceeds cannot exist before the commission of that crime); United States v. Dupree, 919 F. Supp. 2d 254, 269–70 (E.D.N.Y. 2013) (dismissing attorneys' § 853(n)(6)(A) claim where assignment occurred between one and four years after the illegal acts).

82. 21 U.S.C. § 853(n)(6)(B).

83. *Id.*; *see also* United States v. Armstrong, No. 05-130, 2007 WL 7335173, at \*2 (E.D. La. June 1, 2007).

84. *Armstrong*, 2007 WL 7335173, at \*2.

85. *Id.*

86. *Id.* at \*7–8.

87. 21 U.S.C. § 853(n)(6)(B); *see also* *Armstrong*, 2007 WL 7335173, at \*2.

found forfeitable.”<sup>88</sup> The services rendered for the defense meet this requirement.<sup>89</sup>

The difficulty stems from the second element of § 853(n)(6)(B).<sup>90</sup> The petitioner cannot simply prove that he did not have actual knowledge that the property was subject to forfeiture stemming from a criminal act.<sup>91</sup> Instead, the petitioner must prove that lacking such knowledge was reasonable.<sup>92</sup>

Judicial interpretation of the objectively reasonable belief standard for defense attorneys has evolved over time. In *Caplin & Drysdale v. United States*,<sup>93</sup> the U.S. Supreme Court ruled that, so long as an attorney has read the indictment and knows that the government is seeking forfeiture of her client’s property, she is on notice of the forfeiture and would be unable to satisfy the “without cause to believe” requirement.<sup>94</sup> Pursuant to Rule 7(c)(2) of the Federal Rules of Criminal Procedure, the Government must specify in the indictment what property, if any, is subject to forfeiture.<sup>95</sup> Accordingly, the attorney would be on notice that the funds being used to pay her fees were potentially tainted and would lose the protection of the § 853(n)(6)(B) reasonableness standard.

Similarly, in *United States v. Timely*,<sup>96</sup> the Eighth Circuit denied the attorney’s bona fide purchaser protection because the defense attorney acquired his interest in the tainted funds more than one month after the jury indicted his client.<sup>97</sup> The Eighth Circuit agreed with the Supreme Court that “the only way a lawyer could be a beneficiary of § 853(n)(6)(B) would be to fail to read the indictment of his client.”<sup>98</sup>

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88. *Armstrong*, 2007 WL 7335173, at \*2.

89. See *In re Moffitt, Zwerling & Kemler, P.C.*, 846 F. Supp. 463, 472 (E.D. Va. 1994), *aff’d sub nom. United States v. Moffitt, Zwerling & Kemler, P.C.*, 83 F.3d 660 (4th Cir. 1996).

90. Some courts have split the first element of § 853(n)(6)(B) into two elements. Compare *United States v. Timely*, 507 F.3d 1125, 1130–31 (8th Cir. 2007) (explaining that a § 853(n)(6)(B) defense consists of three elements: “(1) the claimant has a legal interest in the forfeited property; (2) the interest was acquired as a bona fide purchaser for value; and (3) the interest was acquired at a time when the claimant was reasonably without cause to believe that the property was subject to forfeiture”), with *In re Moffitt*, 846 F. Supp. at 472 (noting that to prevail under § 853(n)(6)(B) a lawyer must establish “(i) that it was a bona fide purchaser for value . . . and (ii) that at the time of the purchase, it was ‘reasonably without cause to believe’ that the money constituted or was derived from [illegal activities]” (quoting 21 U.S.C. § 853(n)(6)(B))).

91. See *Armstrong*, 2007 WL 7335173, at \*2.

92. *Id.*

93. 491 U.S. 617 (1989).

94. *Id.* at 633 n.10; see also *United States v. Bissell*, 866 F.2d 1343, 1349 n.5 (11th Cir. 1989) (finding that “[i]t is unlikely that an attorney will ever achieve th[e] status [of a bona fide purchaser] since he is the most likely person to appreciate the forfeitability of his client’s assets” and that “an attorney retained to defend one whose assets are subject to forfeiture and restraint may go uncompensated”).

95. Congress eliminated this portion of Rule 7 of the Federal Rules of Criminal Procedure in 2009 because the same language was added to Rule 32.2(a) in 2002. See FED R. CRIM. P. 7 advisory committee’s note to 2009 amendment.

96. 507 F.3d 1125 (8th Cir. 2007).

97. *Id.* at 1131.

98. *Timely*, 507 F.3d at 1131 (quoting *Caplin & Drysdale v. United States*, 491 U.S. 617, 632 n.9 (1989)).

The Supreme Court's rule that reading the indictment is enough to put the defense attorney on notice fails to recognize the complexities of white collar defense. In many white collar cases, attorneys are "frequently retained before an indictment has been returned," and "the relevant allegation in the indictment is not the specific asset used to pay the attorney but, instead, a generic provision tracking the statutory language of . . . 'any and all properties constituting, or derived from, directly or indirectly, as the result of' some crime."<sup>99</sup> Thus, when a potential client comes into a white collar defense attorney's office, the attorney cannot be expected to know whether a client's funds are tainted or derived from any crime.<sup>100</sup>

c. *The Moffitt Investigation*

Despite the Supreme Court's decision to set a high bar for defense attorneys attempting to retain fees subject to forfeiture, some circuits have adopted an interpretation of the bona fide purchaser exception that adequately accounts for the levels of investigation and representation performed by defense attorneys prior to their clients' indictments. In *United States v. Moffitt, Zwerling & Kemler, P.C.*,<sup>101</sup> the Fourth Circuit held that the petitioning law firm was not reasonably without cause to believe that the funds paid to it were subject to forfeiture where it knew the client was the subject of a grand jury investigation.<sup>102</sup> In *Moffitt*, the client approached the firm for representation after the grand jury had begun investigating and after some of his personal and business assets had been seized.<sup>103</sup> The firm asked that the client pay a large portion of its fees upfront, totaling more than \$100,000.<sup>104</sup> The client paid \$17,000 with a wad of bills fished from his pocket and, the following day, paid the remaining funds with cash stored in a cracker box or a shoe box.<sup>105</sup> The firm did not ask the client where the money came from but did tell the client that it would not accept "funny money."<sup>106</sup> The client refused a receipt for both payments out of fear that the FBI might find it.<sup>107</sup>

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99. Barry Tarlow, *RICO Report: Five Important Words on Fee Forfeiture: Getting It Up Front & Getting It in the End*, CHAMPION, May 2004, at 61. The Rhode Island District Court has also recognized that the indictment standard makes little sense, noting that when "an indictment is based solely on evidence presented by the government which a defendant has no opportunity to challenge, an indictment, alone, is not a sufficient ground for inferring reasonable cause for the defendant's attorney to believe that the defendant probably will be convicted." *United States v. Saccoccia*, 165 F. Supp. 2d 103, 112 (D.R.I. 2001). This inference "would deny virtually every defendant accused of an offense carrying a forfeiture penalty of the right to counsel of his or her choice because the risk of not being paid would deter most attorneys from accepting such cases." *Id.* Accordingly, the court allowed the petitioning attorneys to keep all fees collected prior to the conviction of their clients. *Id.*

100. Tarlow, *supra* note 99, at 61.

101. 83 F.3d 660 (4th Cir. 1996).

102. *Id.* at 665–66.

103. *Id.* at 663.

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

After receipt of the retainer, the law firm met with the prosecutors in the case.<sup>108</sup> During these meetings, the government described the strength of its case against the client and disclosed the fact that assets were already seized.<sup>109</sup> The government also shared an affidavit prepared by an IRS investigator that supported search and seizure warrants executed against the client.<sup>110</sup> The affidavit reported that the volume of the client's spending and saving was so vast that it could only have come from drug trafficking.<sup>111</sup> The affidavit also revealed that the client used his businesses to facilitate drug sales and to launder drug profits.<sup>112</sup> The client was indicted soon after this meeting and the government sought forfeiture of all funds paid to the firm.<sup>113</sup>

Ultimately, the court ordered that the firm forfeit the entire fee.<sup>114</sup> In making this determination, the court noted that "the lawyers did not seek to obviate doubts that any person would have had about the source of [the client's] substantial cash payment. The meetings, in fact, create the impression that the participants were engaging in some sort of wink and nod ritual whereby they agreed not to ask—or tell—too much."<sup>115</sup>

Thus, the *Moffitt* court created a duty for attorneys to conduct an investigation of fee payments to satisfy the "reasonable without cause" provision.<sup>116</sup> The district court held that attorneys, when confronted with clients with potentially tainted assets, should first inform prospective clients that they cannot pay fees with proceeds from crimes and that such proceeds are subject to forfeiture, even in attorneys' hands.<sup>117</sup> Should the client answer "that the money comes from legitimate sources, attorneys should take whatever further steps or ask whatever further questions may be suggested by the circumstances to satisfy themselves that it is objectively reasonable to believe the answer."<sup>118</sup>

The Fourth Circuit did not, however, provide a clear answer to how much investigation needs to be done. Instead, the court required that attorneys "ask sufficient direct questions and take whatever further steps the client's answers might indicate to ensure that a belief that the funds are legitimate is objectively reasonable."<sup>119</sup> The court added that "[n]o precise formula exists to define the appropriate inquiry in all circumstances. Each situation may be different."<sup>120</sup>

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108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.* at 663–64.

114. *Id.* at 664.

115. *Id.* at 666.

116. See *In re Moffitt*, Zwerling & Kemler, P.C., 846 F. Supp. 463, 474 (E.D. Va. 1994), *aff'd sub nom.* United States v. Moffitt, Zwerling & Kemler, P.C., 83 F.3d 660 (4th Cir. 1996).

117. *Id.*

118. *Id.*

119. *Id.*; *cf.* *Moffitt*, 83 F.3d 660.

120. *Id.*; *cf.* *Moffitt*, 83 F.3d 660.

Similarly, in *United States v. McCorkle*,<sup>121</sup> the U.S. District Court for the Middle District of Florida held that the defendant's attorney, F. Lee Bailey,<sup>122</sup> could not claim the bona fide purchaser protection where (1) he knew that the federal and state governments suspected that his clients were leaders of a major infomercial fraud scheme, (2) the government had seized nearly all of his clients' personal and business assets based on a judicial officer's finding of probable cause to believe that the assets were subject to forfeiture, and (3) the government actively sought forfeiture of the laundered fraud proceeds through criminal indictment and forfeiture actions.<sup>123</sup> The court held that Bailey learned, or should have learned, all of this information in his own investigation.<sup>124</sup>

The Fifth and Ninth Circuits have imposed a similar affirmative duty of investigation on criminal defense attorneys. In *F.T.C. v. Assail, Inc.*,<sup>125</sup> the Fifth Circuit held that if an attorney has been paid with tainted funds and wishes to retain them, "he must demonstrate that he conducted an inquiry sufficient to allow him to be 'reasonably without cause to believe that the property was subject to forfeiture.'"<sup>126</sup> Additionally, the attorney "has a duty to make a good faith inquiry into the source of [her] fees."<sup>127</sup> Punishment for failure to meet this duty is disgorgement of the funds.<sup>128</sup>

In *F.T.C. v. Network Services Depot, Inc.*,<sup>129</sup> the Ninth Circuit, citing *Assail*, held that "an attorney is not permitted to be willfully ignorant of how his fees are paid" and imposed a duty on defense attorneys to conduct an "objectively reasonable and diligent inquiry" into their clients' assets.<sup>130</sup> Thus, not only do attorneys have a duty to read their clients' indictments but they have a legal duty to conduct an investigation into their clients' funds before beginning their representation.

In sum, § 853(n)(6)(B) and subsequent case law provide that earned fees are subject to forfeiture if the fees were in fact tainted, and the lawyer reasonably should have known that, at the time she accepted the fees, they were or probably were tainted. The lawyer may be put on notice (1) by the government through disclosure of an indictment or arrest, a pending grand jury investigation, or its evidence against the client; (2) by the manner in which the fee was paid; or (3) by other facts. When there are red flags, the lawyer has a duty to investigate the cleanliness of the funds.

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121. No. 6:98-CR-52-ORL-19C, 2000 WL 133759 (M.D. Fla. Jan. 14, 2000), *aff'd*, 321 F.3d 1292 (11th Cir. 2003).

122. F. Lee Bailey may have a knack for forfeiting his fees. Another court denied Bailey's petition because he read the indictment and therefore knew the government was seeking forfeiture of the property listed in the forfeiture allegation. *Bailey v. United States*, 54 Fed. Cl. 459, 478 (2002), *aff'd*, 94 F. App'x 828 (Fed. Cir. 2004).

123. *McCorkle*, 2000 WL 133759, at \*33.

124. *Id.* at \*8-14.

125. 410 F.3d 256 (5th Cir. 2005).

126. *Id.* at 265 (quoting 21 U.S.C. § 853(n)(6)(B) (2012)).

127. *Id.*

128. *Id.*

129. 617 F.3d 1127 (9th Cir. 2010).

130. *Id.* at 1144.



## II. LEGAL ETHICS AND ASSET FORFEITURE LAW: THE ZERO-SUM GAME AT PLAY

Returning to the hypothetical presented in the Introduction, imagine a client has come into an attorney's office to notify the attorney that he is being investigated for insider trading. The client has not yet been indicted,<sup>131</sup> but the government has issued subpoenas to the client's employer regarding a specific trade the client performed. There is no doubt that the client profited from this specific trade. The government's investigation is aimed at determining whether the trade was made with *scienter* because insider trading is a mens rea crime.<sup>132</sup> Other white collar crimes that require proof of mens rea include bankruptcy fraud,<sup>133</sup> mail fraud,<sup>134</sup> wire fraud,<sup>135</sup> bank fraud,<sup>136</sup> health care fraud,<sup>137</sup> and securities fraud.<sup>138</sup> For each of these crimes, the government must prove that the defendant had the requisite intent to commit the criminal act.

When representing a white collar defendant charged with a mens rea crime, the defense attorney must begin an investigation. Due to the nature of the crime, the defense attorney often does not need to investigate the act itself but must investigate the state of mind of the client when he committed the act.<sup>139</sup> Such an investigation is more complicated than a normal fact-finding investigation because it involves getting inside the client's mind.<sup>140</sup>

To be a zealous advocate, the attorney must immediately ensure that the government cannot gather enough evidence to indict the client.<sup>141</sup> The attorney must also prepare an alternate theory of the case, in the event that the government is able to bring an indictment against the client. The attorney often employs her own expert accounting and financial investigators and a staff of legal researchers.<sup>142</sup>

In asset forfeiture cases like insider trading,<sup>143</sup> the attorney's investigation must accomplish at least two goals. The first goal is to create a theory of the

131. In the realm of white collar criminal defense, most of the attorney's work comes at the preindictment stage. See KENNETH MANN, *DEFENDING WHITE COLLAR CRIME: A PORTRAIT OF ATTORNEYS AT WORK* 9 (1985); Tarlow, *supra* note 99, at 61.

132. See *supra* note 7.

133. See 18 U.S.C. § 157 (2012).

134. See 18 U.S.C. § 1341 (2012).

135. See 18 U.S.C. § 1343 (2012).

136. See 18 U.S.C. § 1344 (2012).

137. See 18 U.S.C. § 1347 (2012).

138. See 18 U.S.C. § 1348 (2012).

139. See *supra* note 7 and accompanying text.

140. See Chad S.C. Stover, *Best Practices in Proving Specific Intent and Malice. What Can Civil and Criminal Litigators Learn from One Another?*, A.B.A. SEC. ANN. CONF. 1 (Apr. 9, 2014), [http://www.americanbar.org/content/dam/aba/administrative/litigation/materials/2014\\_sac/2014\\_sac/best\\_practices.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/litigation/materials/2014_sac/2014_sac/best_practices.authcheckdam.pdf) [<https://perma.cc/GKY8-DX3P>] ("Proving intent in either the civil or criminal context is inherently difficult. The attorney must attempt to prove (or disprove) what was going on in a person's . . . mind when performing an action or course of conduct.").

141. See MANN, *supra* note 131, at 5 ("[A]bove all . . . the defense attorney works to keep potential evidence out of government reach by controlling access to information.").

142. *Id.*

143. See *supra* note 4 and accompanying text.

case to zealously advocate on behalf of the client. The second goal is to investigate whether the money used to pay the attorney's fees is tainted. To claim the reasonable lack of knowledge standard under § 853(n)(6)(B), the attorney must ask the client "sufficient direct questions and take whatever further steps the client's answers might indicate to ensure that a belief that the funds are legitimate is objectively reasonable."<sup>144</sup>

These two investigations are in direct conflict. If the attorney accomplishes only the first goal of creating an alternate theory of the case, the attorney will lose out on her fees by failing to fulfill her investigative duties under *Moffitt*, as the punishment for failure to conduct a *Moffitt* investigation is disgorgement.<sup>145</sup> If the attorney accomplishes only the second goal of establishing a reasonable lack of knowledge, the attorney will not be able to zealously represent her client, which would leave her subject to discipline.<sup>146</sup> If the attorney attempts to accomplish both goals, she may be asking questions and performing fact investigations that do not align with the best ways to represent her client.<sup>147</sup>

This scenario raises other ethical questions. First, what options does the attorney have if or when she loses her bona fide purchaser status? Can she withdraw from the case and keep the fees she was paid prior to losing out on claiming this exception? What can she reveal to the judge in her motion to withdraw? Second, if she decides to stay on the case, can she use any information obtained in her *Moffitt* investigation in her ancillary hearing under § 853(n)? At what point does the attorney violate her duty to maintain client confidences? This Note examines these questions.

Part II.A examines the ethical issues that arise from the conflict between the fact investigation and the *Moffitt* investigation. Part II.B discusses the attorney's right to withdraw from the case if and when she can no longer show a reasonable belief that the property was not subject to forfeiture. It also analyzes what she can reveal in her motion to withdraw. Finally, Part II.C considers what information, if any, from an attorney's *Moffitt* investigation can be used at the ancillary hearing.

#### A. *The Overlapping Investigation*

Upon being retained by the client, the defense attorney must conduct two simultaneous investigations: a fact-finding investigation and a *Moffitt* investigation. This Part demonstrates that these two investigations have competing goals, and this competition is to the detriment of both the client and the attorney.

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144. *In re Moffitt*, Zwering & Kemler, P.C., 846 F. Supp. 463, 474 (E.D. Va. 1994), *aff'd sub nom.* United States v. Moffitt, Zwering & Kemler, P.C., 83 F.3d 660 (4th Cir. 1996).

145. See *F.T.C. v. Assail, Inc.*, 410 F.3d 256, 265 (5th Cir. 2005) (holding that "when an attorney is objectively on notice that [her] fees may derive from a pool of frozen assets, [she] has a duty to make a good faith inquiry into the source of those fees" and the failure to make such an inquiry will result in disgorgement of her fees).

146. See *supra* Part I.A.1.

147. See *infra* Part II.A.

In his book *Defending White-Collar Crime: A Portrait of Attorneys at Work*, white collar defense attorney Kenneth Mann lays out the ways in which attorneys conduct factual investigations.<sup>148</sup> He notes that there are two possible goals related to these investigations: first, to obtain adequate information about the situation being investigated, and second, to keep the client from communicating information to the attorney that would interfere with her building a strong defense.<sup>149</sup> “Some attorneys, for instance, discourage the disclosure of facts that would negate a defense of lack of knowledge.”<sup>150</sup> They also seek to prevent the client from providing information that would indicate that the client “actually had knowledge of a fact that would prove criminal intent.”<sup>151</sup> A smart attorney does not say to her client, “I don’t really want to know if you saw the document, let’s talk around that.”<sup>152</sup> Instead, Mann notes, attorneys employ refined techniques to put themselves in the best tactical position without violating any moral or ethical standards.<sup>153</sup>

Mann refers to these techniques as “[a]voidance [t]echniques.”<sup>154</sup> The most common avoidance technique is simply not to inquire.<sup>155</sup> The benefit of this ignorance is that the attorney has more leeway with the types of defenses she presents.<sup>156</sup>

To demonstrate avoidance techniques, Mann presents a scenario that is useful for understanding the zero-sum nature of asset forfeiture and attorney’s fees.<sup>157</sup> A client hired a law firm after being investigated for price fixing. The evidence indicates that the price fixing was a one-time event resulting from pressure applied by a superior, who had since left the corporation. The attorneys hoped to convince the prosecutor to exercise his discretion not to indict the client by arguing that his former superior subjected him to irresistible duress. However, just before the meeting with the prosecutor, the client disclosed to the attorneys that he had begun to make similar price-fixing agreements.

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148. See MANN, *supra* note 131, at 103.

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.* at 104.

153. *Id.*

154. *Id.*

155. *Id.*

156. See *id.* at 103. While some may question the ethics of avoidance techniques, they are well within the rights and duties of a criminal defense attorney. The role of the criminal defense attorney is threefold: (1) ensuring that the criminal justice system produces just results by acting as an aggressive advocate in the adversary system, (2) forcing the government to satisfy its burden of proof, and (3) serving as a monitor against government overreach. See Fred C. Zacharias, *Reconceptualizing Ethical Roles*, 65 GEO. WASH. L. REV. 169, 173 (1997). Criminal defense attorneys who employ these avoidance techniques view them as “essential to their own sense of the proper role of the defense attorney in the adversary system and of the ethical and moral standards that govern the legal profession in the context of a criminal investigation.” MANN, *supra* note 131, at 104. For more on the ethical considerations of criminal defense attorneys, see generally Joshua A. Liebman, Note, *Dishonest Ethical Advocacy?: False Defenses in Criminal Court*, 85 FORDHAM L. REV. 1319 (2016).

157. See MANN, *supra* note 131, at 105–06.

Upon learning this information, the attorneys could no longer ethically present the argument that the client was subject to duress. Instead, they had to shift course and argue the weaker point that price fixing occurred because of pressure applied by the superior, not that price fixing was a one-time occurrence.<sup>158</sup> An attorney can only zealously represent her client within the confines of the law.<sup>159</sup> Thus, anytime a client overdiscloses, the attorney's ability to zealously represent the client is greatly diminished.

Asset forfeiture law imposes a duty on the attorney to obtain information that she would rather not have the client disclose.<sup>160</sup> The attorney is required to tell the client that she cannot accept funds stemming from any illegal sources or crimes.<sup>161</sup> If the client tells the attorney that the funds are not tainted, the attorney then must "ask sufficient direct questions and take whatever further steps the client's answers might indicate to ensure that a belief that the funds are legitimate is objectively reasonable."<sup>162</sup> If the attorney fails to make such an inquiry, her legal fees will be disgorged.<sup>163</sup>

The law impedes the attorney's ability to zealously represent her client. Instead of allowing the attorney to engage in avoidance techniques, the law imposes a duty on the attorney to verify that the funds are not tainted.<sup>164</sup> This requires asking the questions the attorney would prefer not to ask. Accordingly, the attorney's ability to raise different defenses is limited—pushing the attorney to the negotiating table instead of avoiding indictment.

This scenario creates a zero-sum game for the attorney and the client. The client loses out zealous representation by greatly limiting the potential theories and arguments the attorney can make on his behalf. The attorney loses out on her ability to claim the bona fide purchaser exemption by forcing the attorney to ask questions designed to eliminate her reasonable lack of knowledge as to whether the funds are tainted.

The *Moffitt* investigation requires that the attorney take steps to determine whether or not funds are tainted.<sup>165</sup> Courts have not defined when the *Moffitt* duty arises, but the investigation is necessary to retain attorney's fees.<sup>166</sup> Thus, it is likely that the attorney will conduct the investigation early in the representation to avoid rendering services without the prospect of compensation. If the *Moffitt* investigation leads an attorney to believe that she will not be able to collect legal fees, it is likely that she will attempt to withdraw from the case.

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158. *Id.* at 106.

159. *See supra* Part I.A.1.

160. *See supra* Part I.B.2.b.

161. *See In re Moffitt, Zwerling & Kemler, P.C.*, 846 F. Supp. 463, 474 (E.D. Va. 1994), *aff'd sub nom.* *United States v. Moffitt, Zwerling & Kemler, P.C.*, 83 F.3d 660 (4th Cir. 1996).

162. *Id.*

163. *See F.T.C. v. Assail, Inc.*, 410 F.3d 256, 265 (5th Cir. 2005).

164. *See supra* Part I.B.2.b.

165. *See In re Moffitt*, 846 F. Supp. at 474.

166. *See supra* Part I.B.2.b.

### B. *The Right to Withdraw*

An attorney does not have a duty to see a case to its natural end. The attorney may file a motion to withdraw as counsel if she so chooses.<sup>167</sup> But the decision to grant a motion to withdraw is within the judge's discretion.<sup>168</sup> This decision often rests on a finding of "good cause,"<sup>169</sup> but determining what constitutes good cause "is not so readily stated."<sup>170</sup>

Both the Model Code of Professional Responsibility and the Model Rules of Professional Conduct allow for permissive withdrawal in certain situations. Under the Code, an attorney may withdraw where the client:

- (a) [i]nsists upon presenting a claim or defense that is not warranted under existing law and cannot be supported by good faith argument for an extension, modification, or reversal of existing law; (b) [p]ersonally seeks to pursue an illegal course of conduct; (c) [i]nsists that the lawyer pursue a course of conduct that is illegal or that is prohibited under the Disciplinary Rules; (d) [b]y other conduct renders it unreasonably difficult for the lawyer to carry out his employment effectively; (e) [i]nsists, in a matter not pending before a tribunal, that the lawyer engage in conduct that is contrary to the judgment and advice of the lawyer but not prohibited under the Disciplinary Rules; (f) [d]eliberately disregards an agreement or obligation to the lawyer as to expenses or fees.<sup>171</sup>

Additionally, the Code allows for permissive withdrawal where the attorney's continued employment would result in a violation of a disciplinary rule,<sup>172</sup> where the attorney cannot work with cocounsel,<sup>173</sup> where the attorney faces mental or physical hardship making effective representation difficult,<sup>174</sup> or if the client freely assents.<sup>175</sup> Under the Code, therefore, an attorney seeking withdrawal for losing her bona fide purchaser exemption has no grounds for permissive withdrawal.

By contrast, the Model Rules allow for permissive withdrawal if "the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client."<sup>176</sup> However, many courts have found that "the nonpayment of fees is usually not a sufficient basis, standing alone, to override the attorney's ethical responsibilities of continued representation of a client."<sup>177</sup> While the nonpayment of fees does

167. *See* *Cordi-Allen v. Halloran*, 470 F.3d 25, 29 (1st Cir. 2006) ("[T]he baseline attorney-client contract does not include a promise to see a claim through to its conclusion under any circumstances.").

168. MODEL RULES OF PROF'L CONDUCT r. 1.16(c) (AM. BAR ASS'N 2017) ("A lawyer must comply with applicable law requiring . . . permission of a tribunal when terminating a representation.").

169. *See* Slater, *supra* note 30, at 1438.

170. *Rindner v. Cannon Mills, Inc.*, 486 N.Y.S.2d 858, 859 (Sup. Ct. 1985).

171. MODEL CODE OF PROF'L RESPONSIBILITY DR 2-110(C)(1) (AM. BAR ASS'N 1980).

172. *Id.* DR 2-110(C)(2).

173. *Id.* DR 2-110(C)(3).

174. *Id.* DR 2-110(C)(4).

175. *Id.* DR 2-110(C)(5).

176. MODEL RULES OF PROF'L CONDUCT r. 1.16(b)(6) (AM. BAR ASS'N 2017).

177. *Reynolds v. Reliable Transmissions, Inc.*, No. 3:09CV238, 2009 WL 3064774, at \*1 (E.D. Va. Sept. 21, 2009); *see also* *NGM Ins. Co. v. Secured Title & Abstract, Inc.*, No.

not stem from the client's inability to pay, courts likely would be reluctant to allow an attorney to withdraw as counsel for fee purposes alone.<sup>178</sup>

Furthermore, an attorney cannot withdraw because the attorney knows her client is guilty. As Justice John Paul Stevens explained:

That a defense lawyer may be convinced before trial that any defense is wholly frivolous does not qualify his or her duty to the client or to the court . . . the stigma of guilt may not attach to the client until the presumption of innocence has been overcome by proof beyond a reasonable doubt.<sup>179</sup>

Accordingly, even if the attorney was able to demonstrate an “unreasonable financial burden”<sup>180</sup> by the loss of the “reasonable without cause to believe” exception,<sup>181</sup> the financial burden would hinge on the attorney's knowledge of the client's guilt.

To withdraw as counsel, the attorney generally must divulge to the court the reasons for withdrawal.<sup>182</sup> Here, the attorney would be forced to admit to the court that she has learned that the client's funds are tainted. This would clearly violate the attorney's duties to maintain client confidences and adhere to the duty of loyalty.<sup>183</sup> Additionally, the client would lose his presumption of innocence in the eyes of the court.

Thus, an attorney who learns that her fees are tainted must decide whether she can withdraw from the case and what information she can reveal in her motion to withdraw. Under *McCorkle*, the attorney is entitled to a pro rata percentage of her fees; she can only collect the fees up until she loses her bona fide purchaser status.<sup>184</sup> The attorney then has no reason to continue representing her client because she is unlikely to recoup her fees. It is in her best interest to withdraw as counsel.

Seemingly, the attorney does not have the option to withdraw as counsel upon learning that the fees are tainted. Instead, the attorney must continue to zealously represent her client until the government convicts the client, negotiates a plea, or drops the investigation. This puts the attorney in an incredibly difficult position. Now that she knows the fees likely are tainted, the bona fide purchaser exception ceases to apply and she must forfeit all future payments. Knowledge of this possibility may influence the advice she gives her client. She may, for example, encourage him to negotiate a plea

3:07CV536, 2008 WL 1826032, at \*1 (E.D. Va. Apr. 23, 2008); *Rophaiel v. Alken Murray Corp.*, 94 Civ. 9064 (CSH), 1996 U.S. Dist. LEXIS 7796, at \*3 (S.D.N.Y. June 7, 1996).

178. Recall that attorneys only forfeit fees upon the client's conviction. In the hypothetical presented, the client has yet to be indicted. A court would be unlikely to approve an attorney's motion to withdraw for failure to pay fees where court proceedings have yet to be initiated and where the client's assets have not yet been frozen.

179. *McCoy v. Court of Appeals*, 486 U.S. 429, 435 (1988).

180. MODEL RULES OF PROF'L CONDUCT r. 1.16(b)(6) (AM. BAR ASS'N 2017).

181. *See supra* Part I.B.2.b.

182. *See HAZARD ET AL.*, *supra* note 45, § 21.17 (stating that a lawyer must provide reasons for her motion to withdraw and, in doing so, may reveal confidences).

183. *See id.*; *see also infra* Part II.C.

184. *See United States v. McCorkle*, 321 F.3d 1292, 1295 n.4 (11th Cir. 2003) (“[T]he court [will] pro rate the value of services that have been rendered by the attorney, immunizing from forfeiture only those fees earned while meeting the [bona fide purchaser] test.”).

deal rather than exercise his right to a jury trial because doing so will lead to an earlier conclusion of the case, reducing the attorney's uncompensated costs and services.

If the court does not permit the attorney to withdraw as counsel,<sup>185</sup> the attorney faces yet another ethical conundrum. Upon withdrawal, an attorney normally provides replacement counsel with her files and folders.<sup>186</sup> These files likely contain evidence pointing to the uncleanness of the funds. Immediately upon review, replacement counsel will have lost his bona fide purchaser exemption and all fees from that point on will be subject to forfeiture. This then incentivizes the replacement attorney to withdraw as counsel. Under this cycle, the client has no opportunity to obtain counsel of his choosing.<sup>187</sup>

If the original attorney decides not to provide all of her findings, the replacement attorney must start from square one, further disadvantaging the client.<sup>188</sup> The white collar defense attorney's advantage is in the control of information.<sup>189</sup> The longer the government has to develop its case, the more likely it is that the client will be indicted.<sup>190</sup> If the replacement attorney has to start his fact and *Moffit* investigations anew, then the Government has a greater chance of advancing its case to the indictment stage.

Regardless of whether the attorney can withdraw from the case after losing the bona fide purchaser exemption, the attorney and the client both suffer. The attorney potentially surrenders her fees for services rendered after losing the bona fide purchaser protection. The client, meanwhile, loses his ability to obtain the counsel of his choosing, and he is more likely to be indicted.

185. See MODEL CODE OF PROF'L RESPONSIBILITY DR 2-110(B)(4) (AM. BAR ASS'N 1980). The Disciplinary Rule also allows an attorney to be discharged by her client. *Id.* Courts sometimes allow an attorney to withdraw when there are "irreconcilable differences." See, e.g., *Cone v. United States*, No. 8:10-cv-1975-T-24 MAP, 2012 U.S. Dist. LEXIS 89578, at \*28 (M.D. Fla. June 28, 2012). However, courts often require that the attorney explain why the relationship is "irreconcilable." See *id.*; *Frazier v. State*, 15 S.W.3d 263, 265-66 (Tex. App. 2000) (denying a motion to withdraw where counsel failed to offer "any facts to demonstrate 'irreconcilable differences' as alleged in the pretrial motion").

186. See J. Vincent Aprile II, *Criminal Justice Matters: Protecting Confidentiality of a Criminal Defendant's Litigation File*, 30 CRIM. JUST. 52, 52 (2016) ("Even though a retained defense attorney is discharged or withdraws from a case, that attorney remains the custodian of the client's litigation file until either the former client or successor counsel, with the consent of the client, requests the file.").

187. The Supreme Court has already ruled on whether the attorney's potential loss of fees under asset forfeiture constitutes a Sixth Amendment violation. See generally *United States v. Monsanto*, 491 U.S. 600 (1989) (holding that the Sixth Amendment does not require "Congress to permit a defendant to use assets adjudged to be forfeitable to pay that defendant's legal fees"); *Caplin & Drysdale v. United States*, 491 U.S. 617 (1989) (holding that the government's interest in obtaining full recovery of all forfeitable assets overrides a criminal defendant's Sixth Amendment interest in using those assets to pay for his defense).

188. Such a decision also likely violates ethical and legal standards. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 46(2) (AM. LAW INST. 2000) ("On request, a lawyer must allow a client or former client to inspect and copy any document possessed by the lawyer relating to the representation, unless substantial grounds exist to refuse.").

189. See MANN, *supra* note 131, at 7.

190. *Id.* at 6 ("[T]he defense attorney first devotes [herself] to keeping evidence out of any prospective adversary forum . . . . This action is crucial to prevent issuance of a criminal charge.").

*C. The Ancillary Hearing*

Once an attorney's factual and *Moffitt* investigations are complete, and the attorney, because of the rules of withdrawal, remains on the case, she must decide what to reveal in her motion for an ancillary hearing to retain fees. Assuming that the client has been convicted, the government will bring an asset forfeiture proceeding.<sup>191</sup> The attorney will then have one last chance to hold onto her fees by petitioning for an ancillary hearing.<sup>192</sup> At the hearing, the attorney may testify, present evidence and witnesses on her own behalf, and cross-examine witnesses.<sup>193</sup> The government has the same rights to support its claim to the property.<sup>194</sup> The attorney carries the burden of proof and must establish her legal interest in the property by a preponderance of the evidence.<sup>195</sup>

The question that remains is what evidence the attorney is entitled to present. In her *Moffitt* investigation, the attorney asked her client a series of questions to determine whether or not the funds used to pay her fees were tainted.<sup>196</sup> The client, knowing that the attorney would rather not know definitively if her client was guilty,<sup>197</sup> lied about the cleanliness of the funds. Is the attorney entitled to present this lie as evidence? Even assuming the client told the truth about the cleanliness of the funds, can the attorney present that as evidence?

These inquiries stem from the attorney's duty to keep client confidences. To zealously represent her client, an attorney and her client must be able to have privileged conversations.<sup>198</sup> This privilege protects all communications "relevant to the subject matter of the legal problem on which the client seeks legal assistance."<sup>199</sup> If the attorney were to violate this privilege, she could face disciplinary action, including disbarment.<sup>200</sup> But the attorney cannot prove her bona fide purchaser status without disclosing this information. The attorney is put in a legal and ethical bind. To protect her fees, she must violate the attorney-client privilege, but she could face disbarment or other disciplinary action for doing so.

The Department of Justice recognizes that this is an ethical conundrum. In the U.S. Attorney's Manual, the Department of Justice lays out guidelines defense attorneys can follow to protect their fees.<sup>201</sup> The guidelines

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191. If the client was not convicted, the attorney would be able to retain her fees because the fees, by definition, cannot be considered tainted. *See supra* note 8.

192. *See supra* Part I.B.1.

193. 21 U.S.C. § 853(n)(5) (2012).

194. *Id.*

195. *See United States v. Armstrong*, No. 05-130, 2007 WL 7335173, at \*2 (E.D. La. June 1, 2007) ("The petitioner carries the burden of proof and must establish his or her legal interest in the property by a preponderance of the evidence.").

196. *See supra* Part I.B.2.b.

197. *See MANN, supra* note 131, at 108.

198. *See supra* Part I.A.2.

199. *See WOLFRAM, supra* note 31, at 257.

200. *See supra* note 39 and accompanying text.

201. *See U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL* § 9-120.000 (2010), <https://www.justice.gov/usam-9-120000-attorney-fee-forfeiture-guidelines#9-120.100> [<https://perma.cc/ES2T-86Q6>].



recognize that “the need for clients to make full and free disclosure to their attorneys outweighs the detriment of placing limitation on the use of some non-privileged communications in certain limited situations.”<sup>202</sup> They also note that “knowledge of the forfeitability of an asset . . . cannot be established by compelled disclosure of confidential communications made during the course of the representation.”<sup>203</sup> But this means that the government cannot compel the attorney to break this privilege—instead, the attorney must voluntarily break her privilege in order to keep her fees.

In sum, the attorney has a personal interest in keeping her fees, but she also has a duty to maintain client confidences. The ancillary hearing puts the attorney in a bind: get paid or face disciplinary action.

### III. THE STATUTORY FIX

This Part proposes a statutory fix to ethical dilemmas arising from asset forfeiture, ensuring that an attorney can retain her fees while avoiding disciplinary action. Like asset forfeiture law,<sup>204</sup> money laundering statutes expanded greatly in the 1980s.<sup>205</sup> In an effort to stem the flow of drugs in the United States, Congress passed the Money Laundering Control Act of 1986 (MLCA).<sup>206</sup> The goal was to “cut[] off the avenues by which dealers could legitimize and spend their money [and] reduce the incentive to import and sell drugs.”<sup>207</sup> Congress again turned its focus to money laundering following the attacks on September 11, 2001, when it discovered that Al Qaeda used laundered money to finance its attacks.<sup>208</sup>

The main tooth of the MLCA is 18 U.S.C. § 1957.<sup>209</sup> This statute criminalizes monetary transactions in criminally derived property that is of a value greater than \$10,000 and is derived from specified unlawful activity.<sup>210</sup> The statute also notes that “[i]n a prosecution for an offense under this section, the Government is not required to prove the defendant knew that the offense from which the criminally derived property was derived was specified unlawful activity.”<sup>211</sup>

In response to MLCA’s enactment, the National Association of Criminal Defense Lawyers (NACDL) lobbied Congress for greater protections for

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202. *Id.* § 9-120.113.

203. *Id.*

204. *See supra* Part I.B.

205. *See* Rachel Ratliff, *Third-Party Money Laundering: Problems of Proof and Prosecutorial Discretion*, 7 *STAN. L. & POL’Y REV.* 173, 173 (1996).

206. *Id.*; *see also* Money Laundering Control Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (codified at 18 U.S.C. §§ 1956–1957 (2012)).

207. Ratliff, *supra* note 205, at 272.

208. *See* Sally Baghdasarian, Comment, *Gatekeepers: How the Broad Application of Anti-Money Laundering Statutes and Strategies May Open an Attorney’s Gates to Prosecution*, 32 *SW. U. L. REV.* 721, 721 (2003). In 2001, Congress passed the USA PATRIOT Act. *See* Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (codified in scattered sections of Titles 8, 12, 15, 18, 20, 31, 42, 47, 49–50 of the U.S. Code).

209. 18 U.S.C. § 1957 (2012).

210. *Id.* § 1957(a).

211. *Id.* § 1957(c).

defense attorneys.<sup>212</sup> They argued that “defense lawyers would occasionally know that their fees were being paid from ill-gotten gains” and that if “legal fees were not restrained, clients would not receive adequate representation and our legal system would be the loser.”<sup>213</sup> Based in part on these arguments, Congress became afraid that criminal defense attorneys could be imprisoned for money laundering simply for doing their jobs.<sup>214</sup>

In 1988, Congress recognized the need to protect criminal defense attorneys’ fees and prevent disciplinary action that may arise in the pursuit of those fees when the attorney acts legally and rationally. It amended the MCLA to exempt any transaction reasonably necessary “to preserve a person’s right to representation as guaranteed by the Sixth Amendment to the Constitution.”<sup>215</sup> The amendment redefined “monetary transaction”<sup>216</sup> to “not include any transaction necessary to preserve a person’s right to representation as guaranteed by the sixth amendment to the Constitution.”<sup>217</sup> This provided greater protection for defense attorneys by not limiting the exemption to payment of attorneys’ fees, to payments made by the accused personally, or to payments made in connection with a pending criminal case.<sup>218</sup> The amendment has been routinely used to prevent the conviction of reasonable and hard-working criminal defense attorneys.<sup>219</sup>

Similarly, Congress should amend the asset forfeiture statutes to provide an exemption for legal fees. A statutory fix is the only practical solution to the ethical problems that arise when representing a client facing asset forfeiture. In the investigation stage, an attorney would not be forced to conduct an investigation that undercuts her ability to zealously represent her client, a duty that has been recognized since the early nineteenth century.<sup>220</sup> Next, the attorney would not be inclined to withdraw from her client’s case because she would be assured payment for services rendered would not be subject to forfeiture. The client, in turn, would maintain his right to the counsel of his choosing. Finally, the attorney would no longer be required to petition for an ancillary hearing. This would ensure that she does not purposefully violate attorney-client confidentiality or attorney-client privilege. A statutory fix like the MCLA amendment would prevent the criminal defense bar from violating their duties to clients. It would also fulfill the client’s constitutional right to effective assistance of counsel.<sup>221</sup>

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212. See Barry Tarlow, *RICO Report*, CHAMPION, Nov. 2012, at 52.

213. *Id.*

214. *Id.*; see also *United States v. Rutgard*, 116 F.3d 1270, 1291 (9th Cir. 1997) (“Without the amendment a drug dealer’s check to his lawyer might have constituted a new federal felony.”).

215. See Tarlow, *supra* note 212, at 52 (citing 18 U.S.C. § 1957(f)(1)).

216. *Rutgard*, 116 F.3d at 1291.

217. 18 U.S.C. § 1957(f)(1).

218. See Tarlow, *supra* note 212, at 52.

219. See, e.g., *United States v. Velez*, 586 F.3d 875, 879 (11th Cir. 2009) (holding that “the plain language of § 1957(f)(1) clearly exempts criminally derived proceeds used to secure legal representation to which an accused is entitled under the Sixth Amendment”).

220. See *supra* note 19.

221. See U.S. CONST. amend. VI.

## CONCLUSION

The asset forfeiture statutory scheme is a confusing and convoluted means of ensuring that a criminal defendant does not receive any benefit from the commission of a crime. However, federal asset forfeiture laws currently put criminal defense attorneys in a zero-sum position; they must violate their duty to zealously represent their client, and they are forced to represent their clients for free or face disciplinary action and disgorgement of any paid funds. Congress must step in and amend 18 U.S.C. § 853 to exempt attorneys' fees from the threat of asset forfeiture. Only then can criminal defense attorneys provide their clients with an adequate defense.